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THE LAW REVIEW.

ART. I.—LIVES OF THE CHANCELLORS.

The Lives of the Chancellors and Keepers of the Great Seal in England from the earliest times till the Reign of George IV.

By JOHN LORD CAMPBELL, A.M. F.R.S.E. The first Series.
3 Vols. octavo. Pp. 1900. Murray, 1845.]

LORD CAMPBELL has, we think, rendered a very acceptable service not only to the legal profession, but to the History of the country, by the preparation of this important and elaborate work. It contains a great body of interesting and useful information, both on the progress of our jurisprudence, on that of our judicial system, and also on the state of the constitution, and the various events in our civil annals at different periods of time. The book is marked by a laudable degree of diligence in collecting the materials; and these are so well used, and the whole so clearly put together, that its pages, numerous as they are, far from tiring the reader, prove capable of maintaining his attention throughout; and though certainly the work is calculated for occasional perusal and not to be read consecutively, it may really be pronounced to be interesting and even entertaining. We rejoice, therefore, to see that it is reaching a second edition, in which some slips and errors of importance are likely to be corrected; and we hope that the learned author will be encouraged to proceed with his task till he brings down his biography as near our own times as an impartial pen can safely approach.

He begins with the earliest periods, and gives an introductory view of the origin and functions of the Chancellor's office. He then goes to the Chancellors in the Anglo-Saxon times, in one chapter; and to those from the Norman con-

quest to the reign of Henry II., in another. The rest of the work consists of Thomas à Becket's life, and then of twenty-two chapters giving the Chancellors of different reigns, down to Archbishop Warham, in Henry VII.'s time, including a chapter on Queen Eleanor, the lady Keeper in Henry III.'s time; and finally seventy-two chapters, giving the Lives separately, and in succession, of twenty-eight Chancellors, and five chapters containing an account of the Keepers and Commissioners during the troubles of the seventeenth century. We need say no more to inform our readers how ample the field is over which the author has travelled, how great a collection of facts he has arranged and connected together.

It is certain that by confining himself to the biography of the Great Seal, the author has gained an advantage in the unity of his subject, and the connexion established between its different portions. The same benefit, however, could have been obtained from a general legal biography; and had he written the Lives of Lawyers, he would on the one hand have been enabled to introduce men of great eminence, whom he has been obliged to leave out;—the Littletons, the Cokes, the Plowdens, the Hales, the Powells, the Comyns, the Mansfields, the Kenyons, the Grants, the Holroyds, to say nothing of many great lawyers, on both sides of Westminster Hall who never ascended the Bench; while on the other hand, he would have avoided the necessity under which he has, we think, very unfortunately laid himself, of exhausting his subject by giving an account of every period and of every Chancellor, and of thus writing many a life of no interest, and many a chapter which even if it be useful to consult, will assuredly not be very easy to read. Against this very manifest advantage, there is only to be set the usefulness, which we do not deny, of having a kind of complete history of Equity. But then the accident of the author never having practised in the Courts which administer Equity, has of necessity prevented him from presenting this with due fulness, and he has been led into grave errors in regard to the History of the Equitable Jurisdiction of the Court, some of which it will be our duty to point out.

Upon the execution of this laborious work we have few

and chiefly unimportant objections to make. The narrative is sufficiently clear and distinct; the style is, generally speaking, correct, and avoids the great error on which so many authors make shipwreck; it is plain and unadorned, with sufficient warmth and energy where these are required by the subject; and thus it scarcely ever sins against the rules of a just and severe taste, unless from the author's fondness for recording very middling and not always very refined professional pleasantries. To the praise of felicitous narration it makes but little pretension; indeed this is the last and most difficult acquirement of the historian, and a good narrative style is thus the rarest of his accomplishments to meet with. Lord Campbell's story proceeds diligently and continuously, but it fails in the effect, which arises from a skilful grouping of the facts or from a happy use of the materials: there is no relief, as a picture is not presented to the mind; its lineaments or features are therefore not seized and retained by the memory: after selecting a life or a portion of a life for perusal, (few probably will go on in the order of the chapters,) we go forward and read: we are interested while we read; but we retain very little, and feel glad that we possess the book, and can refresh our recollection when we have occasion for its facts at any other time. This is really the principal defect of the work, and of this we have heard all complain who have discoursed on the subject. Possibly, however, this is only another and a more detailed form of the proposition that, as might well be expected, the learned author has not attained the greatest and most difficult of historical excellencies.

Another defect is the omission of authorities. These are indeed, more sparingly given than the practice of all modern historians, except Voltaire, warrants and entitles us to expect, or the accuracy which that practice has introduced requires. This is a serious objection to the work, and we urge it with the less reluctance because it clearly is one which can be removed in the continuation of the series, and even in a future edition of the volumes now before us.

There is no want at all of candour and impartiality to be charged in the book, with, perhaps, the exception that the author has in one or two instances been too little sensible of

the merits which some have had. But party bias we do not find to taint the work; though we shall give one instance of the opinions which the author holds in his parliamentary capacity, having introduced material error into his commentaries upon the history of an important question. As an illustration of the impartiality which we are commending, we may refer to his account of Clarendon, and the manner in which he sums up that eminent person's character, giving a condensed and most just view of all the bad passages of his life, as well as of those by which he entitled himself to the gratitude both of the dynasty and of the country. This passage we extract:—

“In his conduct we have much more to commend than to censure. His early career was without a blemish; and it is only in considering how few would have done the same, that we can properly appreciate his merit in seeking to gain distinction by the liberal practice of his profession, instead of retiring to obscure indolence upon the competence left him by his father,—and in readily renouncing that profession when it had become to him a source of large emolument, that he might be free to discharge his duties as a member of the legislature at the great crisis of his country's fate. His efforts at the opening of the Long Parliament for the punishment of the Judges, and the correction of abuses, showed him to be a sincere friend of constitutional freedom; and if he went too far in supporting the attainder of Strafford, he might well be excused, from the general enthusiasm then prevailing, and the countenance of the virtuous men with whom he acted. He went over to the King at a time when the disinterestedness of his motives was above all suspicion; and the sound advice which he then gave, if it had been followed, would either have warded off a rupture, or would probably have insured success to the royal cause. We shall now here find better illustrated, than in the state papers he then wrote, the sound principles of representative government and limited monarchy. In his first exile we are called upon to forgive the jealousy and hatred he displayed towards his rival, Lord Keeper Herbert, which we can do, while we admire his fidelity, his industry, and his fortitude.

“We see him in a more trying scene, when in possession of supreme power; and, I think, it is impossible to defend or much to palliate the gross breach of his solemn engagements to the Presbyterians,—his extreme illiberality in matters of Church discipline,—his long-continued negotiation with the Queen to induce her to take the King's mistress into her establishment as one

of her ladies' of honour, — his earnest disavowals of having counteracted the King's designs on Miss Stuart, — his affected indignation at the announcement of his daughter's marriage with the Duke of York, and his pretended wish that she were his mistress, — his encouraging the King to receive money privately from France, — his sale of an important fortress, added by the Commonwealth to the dominions of England, for the purpose of contributing to the expense of the King's profligate pleasures, — his repeal of the triennial Act, without any effectual provision to limit the duration or to prevent the intermission of Parliaments, — or his violent opposition to the appropriation of the supplies and the revision by Parliament of the public expenditure. But, on the other hand, we must bear in mind his steady adherence to the promise of indemnity, notwithstanding the odium he thereby incurred with the dominant party — his opposition to the plan of rendering the Crown independent of Parliament by the grant of a large permanent revenue, — his confirmation of the abolition of military tenures and re-enactment of other good laws of the Commonwealth, — his opposition to the Dutch war, — his steady support of the reformed religion, at the risk of losing the favour of the King, — and his efforts to stem the tide of open immorality, which, flowing from the Court, was threatening to corrupt the manners of the whole nation. If disposed to blame him very severely for remaining in office when his advice was not followed, and he disapproved of the measures of the Government, we should remember that then a unanimous cabinet was not considered by any means necessary, — persons once appointed to the offices of Treasurer, or Chancellor, or Secretary of state, no more thought of voluntarily resigning than a common Law Judge, and till the King dismissed them, they went on doing the duties of their departments and giving their opinions at the Council table when required to do so, leaving the Sovereign to decide when his Ministers were divided. In forming a judgment of Clarendon's administration we must likewise always bear in mind what a character he had to manage in Charles II., — and we should look to that King's subsequent conduct under other counsellors.

“His judicial duties he seems to have discharged to the satisfaction of the public. Burnet says, ‘He was a good Chancellor, only a little too rough; but very impartial in the administration of justice;’ and Pepys, having heard some cases decided by him, makes this entry in his journal, — ‘I perceive my Lord is a most able and ready man.’ These testimonies are not very high as to legal capacity, but show strongly the favourable impression made on the public by his manner and deportment. In the Court of Chancery he was kept right by his assessors. The judicial business

of the House of Lords was then exceedingly small. From the long discontinuance of Parliaments in the reign of Charles I., and the disturbances which had prevailed for the twenty years which followed the meeting of the Long Parliament, the House of Lords had ceased to be regarded as the highest court of justice in the kingdom, as it had formerly been; and in Clarendon's time, luckily for him, it had hardly recovered its appellate jurisdiction. He was the only Law Lord in the House, and his opinion on legal questions would not have carried with it much weight.

"He admirably performed one of the most important duties of a Chancellor by raising the best men he could find to the bench. The aggregate of evil inflicted on the community by a bad judicial appointment is so enormous, that it would be less mischievous to the public if a Chancellor were to accept a bribe for pronouncing an unjust decree, than if, yielding to personal favour or party bias, he should make an incompetent Judge. Hale was supposed to owe his promotion to a desire to take from the House of Commons the active supporter of the Comprehension Bill; but Bridgeman, Twisden, Foster, and Windham, with respect to whom there could be no suspicion of improper motive, were placed by his side." Vol. iii. pp. 259—263.

It must, however, be added, that this summary, though excellent, and just as far as it goes, is far indeed from coming up to the mark in expressing the feelings which arise on contemplating Clarendon's baseness respecting his daughter's marriage—and that it leaves out altogether some of the very worst passages of his political life. But our author had in other parts of his excellent biography both fully related the facts on which judgment of condemnation must go forth, and given vent to his own feelings of honest indignation and scorn at the Chancellor's vile hypocrisy respecting his favourite daughter, whose death afterwards led to his own, and whom he had ever cherished above all earthly possessions; an hypocrisy which could make him, in order to court the sovereign of the day, not only clothe himself with affected rage at her presuming to marry the heir presumptive, but avow his desire to see her rather the strumpet than the wife of the prince. Our author had likewise before related with just reprobation the share which Clarendon had in the mean and cowardly sacrifice of disinterring the illustrious Cromwell and the gallant Blake, "the boast of freedom," and insulting their mangled remains,

In some respects this is the best of these lives, though we have generally heard Bacon's most commended: we do full justice to its merits; and we think the estimate of that great man's genius just, as well as the opinion pronounced upon his too celebrated delinquencies. The philosophical part of his history, by far the most remarkable, is of course very slightly treated, and with no great felicity. The author shows no familiar acquaintance with the subject. Thus he very imperfectly, if at all, notes the singular fact that the great teacher of the inductive method, by his precepts, should have shown himself wholly incapable of practising his own rules, the *Sylva Sylvarum* being really the very worst of his performances, and his induction upon Heat, the instance taken to exemplify his method, being an entire failure. Nor has our author given the best proofs of experimental philosophy having been practised, though rarely, before Bacon. To say nothing of Aristotle's constant habit of collecting facts in treating natural knowledge, Gilbert's Book on Magnetism, long before Bacon's *Instauratio Magna* saw the light, offers a complete instance of the inductive process. But a greater error in the History of Science is committed, where Lord Campbell thus writes: —

“I deny the recent assertion that little practical benefit arose from his writing, which is founded on the false statement that they were little read in England, and were hardly known abroad till analysed in the preface to the French Encyclopedia by D'Alembert. They were eagerly read and studied in this country. From this time they were regularly published, and as soon as they appeared here they were reprinted and translated on the Continent. Attacked by obscure men they were defended by Gassendi, Raffendorf and Leibnitz. They made a deep impression on the public mind of Europe which has never been effaced, and to their direct and indirect influence was to be ascribed many of the brilliant discoveries which illustrated the latter half of the seventeenth century.” Vol. ii. p. 426.

Now it required some courage to write such a passage, when not only we have seen how moderately our author seems to be versed in such subjects; but also when he is impugning, possibly without knowing it, the very highest authority on any point of Literary History — Professor Stewart — who

thus has written in his celebrated Preliminary Discourse to the Encyc. Brit. p. 56. — “That the works of Bacon were little read there (on the Continent,) till after the publication of D’Alembert’s Preliminary Discourse, is, I believe, an unquestionable fact; not that it necessarily follows from this, that, even in France, no previous effect had been produced by the labours of Boyle, of Newton, and of the other English experimentalists, trained in Bacon’s school.”

We repeat, however, that subject to these remarks, and to another upon an unhappy note (ii. 407, 408.), we regard this life of Bacon as a most important and useful accession to legal and political history. We might also take exception to the tone of the judgment pronounced upon the great father of inductive philosophy. In courtesy of speech it is true, and by a sort of metaphor, critics and historians are said to pronounce sentences upon the merits of the authors on whose books they comment, and upon the actors in scenes which they describe. But they ought ever to keep in mind, if they would escape ridicule, that there are some merits so clear and manifest, so prodigious in all men’s concurring opinion, so long and universally decided upon by the irreversible sentence of ages, that they are wholly exempted from the jurisdiction of those who would exercise the critical or historical office in the present day. We may express our reverent admiration of Newton, and meekly avow our deep sense of Bacon’s greatness; but to add our testimony to their stupendous merits,—even when it is done by the common phrases generally used to conceal thoughts very far from humble, savours of the ludicrous; and still more to give a plain and blunt judgment in their favour, as if they were parties before the Court of Appeal in a cause, or peradventure Lord Ordinaries in the Court of Session, whose interlocutors were under review. Lord Campbell seems to have had these considerations imperfectly in his mind when he “declares his humble but hearty concurrence in the highest praises that have been bestowed upon Lord Bacon for what he did for science” (ii. 425.); but still more imperfectly when he says, “I readily acknowledge him to be a great man, but can only wish he had been a good man.” (Ib. 432.) We hope we shall not be deemed hypercritical if we object to what immediately follows, but on other grounds,—“transposing

the words applied by Tacitus to Agricola, I may truly say, "*Magnum virum facile crederes, bonum libenter.*" Now this is "applied by Tacitus, not to Agricola's character, but to his face only; "*nihil metus in vultu; gratia oris supererat; bonum virum facile crederes, magnum libenter,*" says his son-in-law.

The note to which we have adverted is somewhat infelicitous as applied to a passage setting forth the superiority of success in literature over the gratification of a vulgar ambition; and in that note Lord C. is pleased to inform his readers that, "as several Englishmen owe their distinction as authors to their crosses as politicians" — "if his *Lives of the Chancellors* gain any celebrity, his humble name may be added to the class adorned by Clarendon and Bolingbroke," and then "he will be highly contented with his lot." Now we both hope and believe that Lord Campbell's book will descend to posterity; but in order that this *contentment* whereof he speaks may befall him he must not only be on the list, but on the shelf with these great masters. He then deems it necessary to confess that he does "not undervalue great judicial reputation, yet would rather have written Hyde's character of Falkland, than have pronounced the most celebrated judgments of Hardwicke or Eldon." Men have not been able to find any judgment of Lord Eldon which could excite much envy, and have marvelled that aspirations after the fame of Grant in this kind had not rather been breathed. It has also been a good deal asked, and with incredulity, what are the crosses which Lord Campbell has endured, to make him insinuate if not exclaim of men ruined, attainted, impeached, and exiled —

" Equall'd with me in fate,
So were I but their equal in renown?"

For a much more successful, and let us fairly add, a more deservedly successful professional man, we could not easily name, in any of the learned vocations.

We could point out other passages of a personal and unfortunate description — they really are not very thinly scattered through the volumes, and may all be suppressed with manifest advantage in a new edition. Thus (i. 525), "The law of forfeiture, in case of larceny, I am ashamed to say — *notwithstanding the efforts I have myself*

made in Parliament to amend it, still disgraces our penal Code." Indeed this excessive arrogance we must in candour admit may only be the clumsiness of the phrase. It is very possible the real meaning may be that the author, notwithstanding his taking pains to exempt himself from the disgrace by his own efforts, yet feels to share in the shame of these failures. Other similar passages with reference to his book reaching posterity, are not susceptible of the same charitable construction. It is indeed quite a matter of common courtesy for all authors to assume that their writings never can reach posterity. Lord C. seems to think the true presumption is just the other way.

The work, as might be expected from the author's professional habits, and long experience and large practice at the bar, is sufficiently accurate on legal matters. Some exceptions there are, but some must be from inadvertence, or from imperfect statement; as where he speaks of Wolsey "applying a very vigorous remedy to the delays of Chancery, by at once establishing of his own authority without any application to parliament to appoint Vice-Chancellors, four new Courts of Equity, by commission in the King's name, and that the Master of the Rolls alone of the three continued after Wolsey's death—the three other Courts fell with their founder." (i. 500.) Now the Master of the Rolls, as a note to the passage accurately informs us, had Equitable jurisdiction long before Wolsey's time. But Lord C. should have stated what he must well know, that the other Courts thus created were wholly illegal, the Crown having no power whatever to erect any Court of Equity, or any Court that does not proceed according to the course of Common Law. The negative of Wolsey not applying to Parliament does not at all express this, and it is plainly introduced in order to cast an imputation in the nature of a sneer, we think a very just one, at those who, to get rid of a temporary arrear, thought fit to create no less than three Vice-Chancellors.

We cannot, as we have before observed, so implicitly extend our commendations to Lord Campbell's work, so far as it gives the history of the Equitable Jurisdiction of the

Court of Chancery. In the Introduction to the work, Lord Campbell observes, that from the distinguished ability of the men presiding in the Court of Chancery, who were assisted by the Master of the Rolls, and the other Masters — Ecclesiastics well skilled in the CIVIL LAW — the Equitable Jurisdiction of the Council “(that is the Select Council, composed of the Lord Treasurer, and other great officers, Peers, and Judges),” fell into desuetude, like that of the Parliament; and in the Court of Chancery that *admirable system of Equity* which we boast of in England, *was gradually developed and matured*, (p. 9.) But no small portion of the work appears to be devoted to the purpose of showing that, down to the time of the appointment of Chancellors bred to the profession of the law, that is in the latter part of the reign of Henry VIII., there was in the Court of Chancery scarcely any system at all. It will be our business to set up the Introduction against the body of the work, and in a great measure from the facts with which Lord Campbell supplies us.

The passages in the body of the work to which we refer are numerous, the tone is uniform; it may be sufficient to notice the following examples: — “In the old abridgements there are various decisions of Edward the IVth’s Chancellors referred to under the heads ‘Conscience,’ ‘Subpœna,’ and ‘Injunctions,’ the only prior ones being a few in the time of Henry VI.; but they show Equity to have been in the rudest state without systematic rules or principles,” (vol. i. 397.) “Equity decisions at this time (temp. Hen. VII.) depended upon each Chancellor’s peculiar notions of the law of God, and the manner in which Heaven would visit the defendant for the acts complained of in the bill; and though a rule is sometimes laid down as to where a subpœna would lie, it was not till long after that authorities were cited¹ by the Chancellors, or that there was any steady reference by them to the doctrine of the Court.”² And following up

¹ “As yet (temp. Lord Keeper Williams, James I.), the proceedings in the Court of Chancery were not reported, precedents *not being considered as binding there.*” ii. p. 457.

² Vol. i. p. 425.

Lord Coke's eulogy on Edward III.'s Common Law Chancellors,¹ Lord Campbell would lead us to believe that what little of system prevailed during the presidency of the Ecclesiastical Chancellors, was attributable to the Common Law Judges, and that it is to them and the Lay Chancellors, that we owe our system of Equity, which is the subject of such high commendation in the Introduction.²

That we find no authorities cited in the abridgements or even the year books, can hardly be sufficient to show that no authorities were cited or referred to. The Chancellors, as we learn from Lord Campbell, were almost invariably distinguished for their proficiency in the study of the civil law, which every person, and no one better than Lord Campbell, is aware would furnish an almost inexhaustible source from whence to draw all the Equitable principles which they had to apply. The reporters for the year books would scarcely introduce the maxims which the Chancellors enunciated from the *Corpus Juris*. But there were recorded decisions of the Chancellors themselves to refer to: that the decrees of the Chancellors from the time of Henry V. were recorded is clear. By the 11th of the renewed orders for the regulation of the Court of Chancery of the time of Henry V. two Registrars (*Tabelliones*) were appointed to write down the decrees of the Chancellor, one of whom was to attend upon the Chancellor, the other the Master of the Rolls.³ On the question in regard to granting Injunctions after Judgment in the time of James I., the king expressly desired that Sir F. Bacon, and the other law officers should search for precedents, and it was in the main settled upon the precedents produced which extended back to the reign of Henry VII.⁴ The registrars' books prior to the 36th of Henry VIII. have not yet been found; but from that time they exist in regular succession, and the appearance of the first of these books shows that it is only a continuation. By the revised Orders of the time of Henry V., it was also directed that no sub-

¹ 4 Inst. 79.

² *Int. al.*, i. 269. 423., ii. 211.

³ Sanders's Orders, i. p. 7 c., under Cardinal Beaufort or Longley, Bishop of Durham.

⁴ Cary's Reports, p. 172. *et seq.* Instances of earlier date of express reference to precedents might be cited from the Registrar's books.

poena should issue till a bill were filed¹, signed by one of the Council *practising at the Chancery Bar*, plainly showing that at that time the Court of Chancery was a regular Court of Equity, with a distinct bar. With these facts before us, to suppose that the decisions depended on the notions of the individual Chancellor without regard to any fixed principles or to precedent, appears to us to be contrary to all probability; indeed it is not to be believed that such a tribunal would have been tolerated.²

¹ Section 17. Sanders, p. 7 a.

² Lord Campbell remarks that we cannot much admire the reasoning of the Chancellors in deciding the cases which came before them; and in illustration he cites a case from the year books in the time of Edw. IV., in which the Chancellor says that if an executor who converts his testator's estate to his own purpose, if he do not make amends he shall be *damned in hell*. *

The case was this:—the testator had appointed two executors, and one of them, for purposes of his own, had released a debtor to the estate without the assent of the other executor, so that there was not sufficient to answer the purposes of the will. The plaintiff filed a bill against his co-executor, to make him answerable for this fraudulent, or at least improper act (for which there was *no remedy at law*), and against the debtor, who was also safe from any action, though he had not paid the debt, by reason of the release. Fineux, afterwards Chief Justice of the King's Bench (whom we shall have occasion presently again to notice) as counsel for the defendants, insisted that the plaintiff had *no remedy*, for each executor, said he (relying on the technical rule of law), has entire power over the estate, and can do all that both could do; so the release was good. But, said the Chancellor (Archbishop Morton),—No one who is entitled to a remedy shall depart from here without one: it is against reason to say that one executor shall take all the goods, and that there is no remedy. Fineux,—“Then, if all things are remediable here, there is no need of our going to confession (so that it was the common law counsel who introduced the spiritual view of the case):—the law provides for many things: many things not remediable at law are remediable here, and many are between the party and his confessor, and *this is one of them*.” The Chancellor:—“I well know that every law is, or ought to be according to the law of God, and the law of God is, that one ill-disposed executor shall not waste all the goods; and if he do and do not make amends if he can, he will be ‘damned in Hell, &c.’ But further, to give a remedy in such a case in my opinion well agrees with *conscience*. The will makes such and such persons executors, that *they* shall dispose of the estate, &c. So the power is joint, not several: if one acts without the other, he does it without authority;” and he illustrated his position from some doctrines of the Common Law as to Commissions and Powers of Attorney: “here,” said he, “the will gave a particular authority: if the persons to whom it is given exceed it or act contrary to it, in my opinion there ought to be a remedy; but I will hear it argued again.” We do not hesitate to confess that we “admire” the reasoning of the Chancellor quite as much as that of the common law counsel, and we

In further support of Lord Campbell's Introduction we will notice some of the heads of Equity which sprung up during the time, when, according to the general tone of the body of the work, it would be assumed that the Chancellors decided without reference to principle, rule, or precedent. First, as to the doctrine of Uses. The fact that an entire system was founded by the Clerical Chancellors appears to us to be clear; there was but an interval of nine years between the removal of Wolsey, the last of a long succession of Clerical Chancellors¹, A. D. 1527, to the passing of the Statute of Uses, 27th Henry VIII. A. D. 1536. That a regular system in regard to uses had then been constructed can hardly admit of doubt: by the statute above referred to, it was incorporated with the common law; and, moreover, we have the authority of Lord Hardwicke (speaking of the leading principles) that "*Uses before the statute were exactly the same with what Trusts are now.*"² Now that neither Parning, Thorpe, or Knyvett, Edward the Third's Common Law Chancellors, constructed this system, we think we may almost prove from Lord Campbell himself: "so low down as the 7th Henry VI. this kind of property was so little regarded that we find it stated by *one of the Judges* as a thing *not allowed by law*, and *entirely void*, if a man make a feoffment with a proviso that he himself should take the profits."³

The same observations apply to the doctrine of *specific performance*, one other of the most important of the modern

may observe that the three distinct principles which were laid down by the Chancellor in his judgment, imperfectly as it is given (perhaps from the report of Fineux himself), have been acted upon by "the Nottinghams, the Hardwicke, and the Eldons," as the settled doctrines of the Court,—namely, a remedy in case of misconduct may be had by one executor against another notwithstanding that there is no remedy at law. One of several trustees to whom a joint authority is given, cannot of himself do any act binding on the estate:—and although the Court of Chancery recognises the right of one executor fairly to act as representing all, a receipt given by one executor fraudulently and in collusion with the debtor, is treated in Equity and conscience as no receipt at all.

¹ From the death of Sir J. Knyvett, A. D. 1377., with trifling exceptions, all the Chancellors were ecclesiastics.

² Lloyd v. Spillet, 2 Atk. 150.

³ I. p. 376. citing Y. B. 7 Hen. VI. 436. In the 37th of the same King the judges appear to have relaxed a little in favour of the Chancellor's jurisdiction over Uses. Ibid. See further, 1 L. R. p. 387., et seq.

heads of equitable jurisdiction. This was a *creation* of the clerical Chancellors: here they boldly departed from the Roman system of jurisprudence,¹ as they did in other cases when the ends of justice required it. That they had no help on this subject from the common-law judges, is equally clear. Fineux, 21 Henry VII., now become Chief Justice, insisted that an action on the case for *damages* on breach of an agreement for sale of an estate would give a sufficient remedy, and that there was no occasion for a subpoena.²

In further illustration of the systematic application of what are now described as equitable doctrines by the clerical Chancellors, we may observe that the jurisdiction for enforcing the specific delivery of deeds and chattels³,—for making partition between joint-owners,—for taking of intricate accounts,—for obtaining exoneration from liability in a specialty when payment had been made but no receipt taken,—for obtaining relief on lost bonds and the like⁴; and and many other heads of equitable jurisdiction which have been to some extent *adopted by the law*, were plainly constructed by the clerical Chancellors. We pass to another subject of more immediate interest.

Of all the champions of parliamentary privilege Lord Campbell is by far the most distinguished. He bears the same relation to it that Noy was said to bear to prerogative. He first asserted its claim to check and overbear the law: he then advised the committee which examined the precedents, and came to those famous resolutions which have been so much discussed: he was the counsellor of the House of Commons in all subsequent proceedings, recommending them to plead to Mr. Stockdale's action, and take the judgment of the court, recommending them to acquiesce in that judgment, though unfavourable, and recommending them afterwards to

¹ See No. VI. p. 287. of this Review."

² Y. B. of that date, fol. 41. But Brooke in a note to his abridgment of this case, Act. sur le Cas. 72., approves the doctrine of the Court of Chancery.

³ *Vide inter alia*, the Bill, Baker v. Parson, in the Calendars published by the Record Commissioners, fi. p. 50., and the Abbot of Tintern v. Zonge, ib. p. 7. temp. Hen. V., Bill for delivery up of a gilt cross.

⁴ Lord Campbell's Lives, Introd. i. p. 10, note *ibid.* p. 328., and *sparsim*; indeed it is to Lord Campbell's diligence that we are indebted for most of our facts.

punish the officers of the law, to whose lot the execution of the lawful judgment happened to fall.

He was, also, the advocate of privilege in the court of Queen's Bench, and with laudable industry produced one of the most learned and able arguments ever delivered within those walls. Indeed, as a comment on the cases and a statement of the authorities, it may be pronounced perfect. But the authorities, however numerous and grave, had the misfortune to run counter to those first principles, which nobody can ever think of questioning: and Lord Campbell did not even attempt to reconcile them. The two halves of his argument were at war with each other. "The Courts of Law are too ignorant and too obsequious to deal with our privileges," says the first half. But the other half is made up entirely of dicta falling from these same incapable, senile, and incompetent Courts.

Lord Campbell is more enamoured of his defeat than Lord Erskine was of his splendid triumphs. Privilege is as precious in his eyes, as is the true doctrine of the law of treason, the liberty of the press, and the rights of juries, in the estimation of all mankind. The volume of his speeches reproduced the argument which failed to convince the judges of the Queen's Bench. It would have been more regularly addressed to the Court of Exchequer Chamber. The losing party has a right, indeed, to pass over all the Inferior Courts and make his direct appeal to the highest of all, — public opinion. But that supreme court is accustomed to receive the appeal with more favour when it has first been made to all others that have competent power and are more practised in the use of it: and suspects and resents all extrajudicial attempts to bias its ultimate decision.

Such attempts Lord Campbell is incessantly making in this work. There is a restless eagerness to introduce the subject. Every other topic is made an *à-propos* to this. The book most frequently quoted by Lord Campbell, the biographer, is Lord Campbell's collection of his own speeches; and always, if we are not mistaken, on this theme. An eminent lawyer, a most useful reformer of the law, a parliamentary speaker, — in all these characters he is conscious of his claims to reputation; but he appears to undervalue them

all in comparison with the fame to arise from his unsuccessful *plaidoyer* for his clients of the Lower House. And even of that he deems less respectfully than of his dexterity in contriving so vague and general a form of warrant for imprisoning the Sheriffs of London who performed their duty, that its legality could not be questioned in any court of law, and the provisions of the Habeas Corpus Act were, in their case, eluded or repealed.

But there is one most eminently important passage labored with extraordinary care, and composed in an ambitious style, bearing some proportion to its object. It gives a compendious narrative of the establishment of privilege, and professes to trace it to its very origin. This is done in reporting the case of Thorpe, in the reign of Henry VI., often, but always imperfectly, discussed and misunderstood to an extent that is almost ludicrous. He informs us that, when in 1453 the parliament assembled at Reading, the Duke of York was found to have a powerful party in both Houses, "and the Speaker chosen was Thomas Thorpe, (Chief) Baron of the Exchequer, whose imprisonment gave rise to the famous case of parliamentary privilege, in which the judges declared that such questions did not belong to them to consider." The glory of this declaration is given to Sir John Fortescue, by whose lips it was made (*magnum et venerabile nomen*), "who was Chief Justice of the King's Bench, and one of the most learned and upright who ever sat there," but whose title to a place in this work is very doubtful; for though in the dialogues which form his work, *De Laudibus legum Angliæ*, he may mean to describe himself as the person who speaks as Chancellor, it is almost certain that he never held that office.

"He laid the foundation of *parliamentary privilege*, to which our liberties are mainly to be ascribed. He had the sagacity to see, that if questions concerning the privileges of parliament were to be determined by the common law judges appointed and removable by the Crown, these privileges must soon be extinguished, and pure despotism must be established. He perceived that the Houses of Parliament alone were competent to decide upon their own privileges, and that this power must be conceded to them, even in analogy to the practice of the Court of Chancery and other inferior tribunals. Accordingly, in Thorpe's case, he expressed an

opinion which, from the end of the reign of King Henry VI. till the commencement of the reign of Queen Victoria, was received with profound deference and veneration." Vol. I. p. 373.

Men of all opinions will ponder with astonishment on this laboured statement. The *foundation* was laid in the 31st year of the reign of Henry VI., when parliament had existed at least two centuries. It is a mistake to suppose that privilege belongs to the very idea of a parliament, or that its necessity had been proved by experience, or that it had been claimed by its own patriotic members. Founded it was, by a stranger to its body, by a JUDGE, appointed, and most probably (for it was not always so) removable by the Crown. That Judge saw that it must be *conceded*, by analogy to the Court of Chancery and other inferior courts. Truly, there have been seasons when such a statement of the origin of privilege might have secured the writer a lodging in Newgate or the Tower.

Lord Campbell furnishes the following Report of this "famous case."

"Thorpe, a Baron of the Exchequer, and Speaker of the House of Commons, being a Lancastrian, had seized some harness and military accoutrements which belonged to the Duke of York, who brought an action of trespass against him in the Court of Exchequer to recover their value. The plaintiff had a verdict, with large damages, for which the defendant, during a recess of Parliament, was arrested and imprisoned in the Fleet. When Parliament re-assembled the Commons were without a Speaker: and the question arose whether Thorpe, as a member of the Lower House and Speaker, was not now entitled to be discharged?

"The Commons had a conference on the subject with the Lords, who called in the Judges, and asked their opinion. 'The said Lords, Spiritual and Temporal, not intending to impeach or hurt the liberties and privileges of them that were coming for the commerce of this land to this present parliament, but legally after the course of law to administer justice, and to have knowledge what the law will weigh in that behalf, opened and declared to the Justices the premises, and asked of them whether the said Thomas Thorpe ought to be delivered from prison, by, for, and in virtue of the privilege of parliament, or no?' 'To the whole question,' says the report, 'the Chief Justice Fortescue, in the name of all the Justices, after said communication and mature deliberation had amongst them, answered

and said : that they ought not to answer to that question ; for it hath not been used aforetime that the Justices should in any-wise determine the privilege of this high court of parliament : for it is so high and so mighty in its nature, that it may make law ; and that that knowledge of that privilege belongeth to the Lords of the Parliament, and not to the Justices.'

"In consequence of this decision, the two Houses of Parliament were for many ages allowed to be the exclusive judges of their own privileges ; liberty of speech and freedom of inquiry were vindicated by them ; the prerogatives of the Crown were restrained and defined, and England was saved from sharing the fate of the monarchies on the continent of Europe, in which popular assemblies were crushed by the unresisted encroachments of the executive government." Vol. i. pp. 373-375.

At the foot of the page the following *authorities* are cited : "31 H. 6., A.D. 1452. 13 Rep. 63. 1 Hatsell, 29. — *Lord Campbell's Speeches*, 225. Of these four citations, the second is that of the notoriously incorrect *abstract* inserted in the posthumous volume of Lord Coke's Reports. The fourth refers to an *extract* in Lord Campbell's own argument, the same that appears in the ninth volume of Adolphus and Ellis's Reports of Cases in the Court of Queen's Bench : we lament to say that it rivals the inaccuracy of Lord Coke. This will appear from examining the first and third references ; viz., the fifth volume of the Rolls of Parliament, p. 240., and the page above noted from Hatsell.

We beg leave to undertake the office of amanuensis to the noble and learned lord, and copy the important part which he omits : —

"But as for declaration of procedyng in the lower Courtes in such cases as writtes of Supersedeas of Privelegge of Parlement be brought and delivered, the said Chief Justice said that ther *be many and diverse Supersedeas of Privelegge of Parlement brought in to the Courtes*, but ther ys no generall Supersedeas brought to surcesse of all processes ; for if ther shuld be, it *shuld seeme that this high Court of Parlement that ministreth all justice and equitee shuld lette the processe of the commune lawe*, and so it shuld put the partie compleynaunt withoute remedie, for so muche as actions atte commune lawe be not determined in this high Court of Parlement ; and if any *persone* that is a membre of this high Court of Parlement be

arrested in suche cases as be not for treason or felony, or surete of the peas, or for a condempnation hadde before the Parlement, it is used that all such persones shuld be releessed of such arrestes and make an attourney, so that they may have theire fredom and libertee, freely to extende upon the Parlement.

“After which answere and declaration, it was thorowly agreed, assentid and concluded by the Lords Spirituelye and Temporely, that the seid Thomas, *accordyng to the lawe, shuld remayne stille in prison for the causes abovesaid, the Privelegge of the Parlement, or that the same Thomas was Speker of the Parlement, notwithstanding.*”

Without offering any comment on this act of omission, we merely proceed to observe, that from the entire narrative thus completed, we collect some facts with certainty: the session of parliament was opened, and the House of Commons was without a Speaker; his chair was vacant, and he the inmate of a prison, into which he had been cast in a civil action. His adversary was the most powerful subject of the realm, who had the majority in both Houses, who aspired to the possession of the Crown, and was in a few days actually appointed Protector. Privilege never encountered a more formidable foe. But the House of Commons had a simple duty to perform—to complete their number and place their Speaker in his chair. The inviolability of their members from personal arrest was the known privilege of the House, and the known law of the land. The indignity was the greater, as offered to the person of the officer who should have represented them.

But the direct, manly, and needful course of commanding his liberation might have embroiled them with the duke: they deferred their own incumbent duty to the House of Lords, and shrunk from so dangerous a responsibility. In the House of Lords, the great delinquent who was plaintiff in the action avowed the illegal arrest, and the Lords shuffled off an invidious task upon the Judges of the land.

The Judges, thus unreasonably called upon to pronounce on the “order, custom, and privilege” of another court, and that court the highest in dignity and power, since it can make and unmake the laws themselves, reverently declined to answer the question. They would have known how to deal

with the case had it occurred in their own courts, and plainly intimated that the Speaker ought to have been and by them would have been set free; but their advice to both Houses was adopted by neither. The Lords did nothing, and the Commons, returning to their mutilated assembly to elect another Speaker, left the real holder of the office alone in his dungeon.

The answer of Fortescue was certainly worthy of his noble character. His protest in favour of the supremacy of the law and against the interference of might with right, of privilege with justice, is worthy of Holt or Montesquieu. When he spoke of the power of Parliament to make and unmake laws, he could not mean that either House possessed this power under the name of privilege; first, because it is notoriously untrue; and, secondly, because taken in that sense the privilege of one must at all times have been able to set aside any law which both, in concurrence with the Crown, had made. Of all the parties to this famous case, to which such vast consequences are attributed, the Judges alone did their duty. The Commons declined to exercise their privilege, and the Lords to declare it, even when the Judges had directed them what path to take. Law and privilege were here identical: the proper guardians of privilege abandoned both, and this mean abandonment has been regarded for centuries as its greatest triumph, while the refusal of the Judges to direct Parliament on a point of parliamentary practice has been perverted into an admission that the Judges in their own courts have no power to enquire into any thing whatever that either House might see fit to do.

But what lover of our free constitution can refrain from rejoicing with Lord Campbell in the happy consequences of this great decision? "The exclusive right of the two Houses to judge of their own privileges was established, liberty of speech and freedom of enquiry was secured, prerogative was restrained, the greatness of popular assemblies in our monarchy was vindicated." It would have been a grateful task to exemplify these happy results by passages selected from the century and a half which followed:—the period of the mild paternal sway of the Tudors and the Stuarts. We might dwell with satisfaction on the noble bearing of the

independent senator whenever Henry the Eighth or his daughter so far forgot themselves as to indulge in remonstrance against some excess in the freedom of debate, or some undue reluctance to part with public money!

The *settlement* of the great question was best of all. It remained undisturbed till the evil times of Queen Victoria, when her perverse Judges, irremovable as they were, broke in upon the system which Fortescue had founded, and were unconvinced by Lord Campbell's argument. There had been, to be sure, a few trifling exceptions to the all but universal acquiescence. In Floyd's case, the Commons tried and condemned an individual for a breach of privilege. They rested their jurisdiction on that word, and introduced it into their elaborate sentence. The journals prove that the breach consisted in deriding the Electress Palatine, the daughter of the King, who was the head of the Parliament. The King himself, however, ordered his faithful Commons to hold their hand, in direct terms denying the privilege which they asserted: the Lords sharply rebuked them for dealing in such matters, and the Commons with an humble apology revoked their recorded judgment. Among others may be mentioned also the slight interruption to this long tranquillity in the year 1675, when Lord Mohun, with the approbation of the Peers, tore to pieces the warrant issued by the Commons, when the Speaker with his own hand seized a learned serjeant-at-law, whom the Lords had liberated, and the interchange of arrests and assaults was an every day occurrence. In 1679, too, each House strenuously denied the "ancient and *undoubted* privilege" claimed by the other, and similar scenes were enacted through the years 1702, 1703, and 1704.

Perhaps Lord Campbell was not speaking of these claims of co-ordinate powers, but only meant to deny that the Judges in Westminster Hall had shown the same presumption. Yet those courts had frequently sanctioned the proceedings of the Crown in imprisoning Members for the discharge of their duty in Parliament; and Chief Justice Bridgman had asserted the right of the Court of Common Pleas to question what Parliament had done; and Pemberton and Jones had decided against the plea of Topham, their serjeant-at-arms; and their Speaker, Sir William Williams, had been fined for circulating a libel by order of that Honourable House; and

the case of Ashby and White is not a fable, nor Holt a creature of the imagination. Willes had declared that no declarations of the House of Commons should interfere with his administration of the law. Kenyon, Ellenborough, and Bayley, even in maintaining that privilege which the House then claimed and the law allowed, had expressed their resolution to disregard every claim that was inconsistent with the principles of the law.

The merit of drawing a warrant of imprisonment for contempt, in so general a form that its lawfulness cannot be questioned, is surely of an equivocal nature. This merit we thought had been claimed for another; but Lord Campbell, by twice boasting of it, has made it exclusively his own. *Mea frans omnis*. It might have seemed hazardous thus to throw the reins upon the neck of power; we know not whither it will carry us. If some future minister were to persuade a parliament to do what Lord Campbell condemns, as unconstitutional, and declare it a breach of privilege to refrain from taking the sacrament, the Members imprisoned for that contempt might lie in Newgate till the end of the session, by virtue of this general form of warrant; nay more, even the inferior courts might be tempted to follow their example in cases directly conflicting with parliamentary privilege. There might be cross contempts and adverse imprisonments. The Committee of the House of Commons, which reported in Sir F. Burdett's case in 1810, founded themselves in a great degree on that jurisdiction in the Courts of Westminster Hall.

Perhaps the most truly important case ever decided in England, is that which passes under the name of *Bushell*¹, the jurymen who were fined and imprisoned by a judge for a verdict which he concurred in giving. The return to his writ of Habeas Corpus set forth that verdict as the cause of his imprisonment, and in the Court of King's Bench that return

¹ 3 Keble, 938. They refer to Wharton's case in Sir H. Yelverton's Reports, p. 23. "All the parties were found not guilty of murder, wherefore Popham, Gandy, and Fenner fuerunt valde irati, and all the jurors committed, and fined, and bound to their good behaviour," &c. See also *Sidefin*, 272., and *Hardress*. 409.

was held sufficient. The report adds, that all the judges of England and all the King's council were of the same opinion. In the Court of Exchequer the Attorney General expressed the greatest indignation that the parties were allowed to draw the sentence into question, urging that the Crown only had the right to remove such proceedings from the Inferior Court. Even the Chief Baron, Sir M. Hale, upon consultation (it is said) with all the Judges, appears to have connived at this doctrine. Happily for England, however, Lord Chief Justice Vaughan and his fellows, the Judges of the Common Pleas, had the penetration to discover the true principle, through the mists of precedent and authority, and the courage to assert it in defiance of power.

But, if Lord Campbell had been the Attorney General at that day, he might have effectually defeated their honest determination, by couching this illegal and infamous warrant in general terms.

We could have wished, if our space allowed it, to be heard at large in mitigation of the very severe judgment passed upon Lord Shaftesbury : we really suspect that he has not been forgiven for his triumphant assertion of the true privilege of the House of Lords, and his victorious refutation of the mock privilege of the House of Commons ; that he suffers for his virtue in this instance, and is the victim of courage, talent and eloquence, exerted in a righteous cause. For in vol. iii. p. 324. we read that Charles II.'s boldest attempt to establish arbitrary power, called " an Act to prevent the Dangers which may arise from Persons disaffected to the Government," passed the Lords, and was sent down to the Commons, where bribes had been copiously distributed, and it was read a second time by a large majority, when Shaftesbury arrested its progress and defeated it, *by getting up* a quarrel between the two Houses in a question of privilege. This he dexterously inflamed to such a pitch of violence that it threatend a public convulsion." In p. 327. "the dispute was brought to the verge of civil war ; — for tactics there is no parliamentary campaign more brilliant than this of Shaftesbury." His admirable vigour in debate, his noble pleading against arbitrary power, — "all this was nothing compared to his dexterity in *playing off*

the Houses against each other on the question of privilege. Such fervour did he excite in the Commons, that no courtier had the courage to oppose the resolutions against the *encroachments* of the Lords, and they passed *nemine dissente*. In the Lords, although at the head of a very small political party, he so manœuvred that the resolutions, though highly distasteful to the Court, were carried by a large majority, composed chiefly of supporters of the Test Bill, which they were *framed* to defeat, and he carried along with him the whole House, except a few bishops and placemen."

The notion of Shaftesbury having *got up* this storm for his own purposes is one of those refined speculations upon the springs of human conduct which party zealots and over ingenious men sometimes prefer to adequate and obvious motives. It was broached in some pamphlets of the day, and receives some little countenance from Sir John Reresby, but is almost disproved by the silence of contemporaneous writers, and omitted by the good sense of most succeeding historians. The devoted champion of privilege wishes us to believe that all the wholesome functions of parliament were suspended for two sessions, and the country almost plunged in civil war, because a reckless politician, for an object of his own, which might as well have been mischievous as laudable, — the defeat, for example, of the Habeas Corpus Bill, instead of that for imposing an impolitic test — was able to move the House of Commons by an absurd claim of privilege to execute unconsciously his project. We are tempted to wish that it were credible, for the lesson against lodging arbitrary power in such hands would be thereby rendered ten times more impressive. The excitement of passion in a powerful popular assembly goaded by the persuasion that a wound has been inflicted on its dignity, — its rapidly contagious nature, — its unreasoning violence, then greatest when it most misdoubts the justice of the occasion, and the art with which crafty men can turn it to their own selfish ends; all these are striking features in the case, which might receive illustration from every one of the famous privilege contests.

The author of the Habeas Corpus Act cannot be robbed of his just renown. But Lord Campbell would strip from the

brow of Shaftesbury another wreath which the hand of genius had placed there: the praise of Achitophel from the pen of Dryden was an honorable sacrifice of party spleen to the sense of justice. "But" (says Lord C.) "he was the worst judge that ever sat in the Court," and "the panegyric was purchased." He then revives a second antiquated and exploded tale of Shaftesbury having recommended Dryden's son to the Charter-house. Sir Walter Scott says, "A report was circulated, and has crept into the '*Biographia Britannica*,' that this addition," (viz. of the famed panegyric,) "was made in consequence of Shaftesbury's having conferred a favour upon Dryden and his family in the interval between the first and second edition of '*Absalom and Achitophel*;' but this Mr. Malone has refuted in the most satisfactory manner."¹ Mr. Malone does indeed demolish the imputation effectually, for he shews that Shaftesbury never gave the recommendation; proving by authentic documents, first, that it was given by the King, second, that Shaftesbury was dead when it was given. It is very remarkable that the first edition contained a panegyric even warmer than that in the second, though less expanded.

" Oh, had he been content to serve the Crown
With virtue only proper to the gown,
David for him his tuneful harp had strung,
And Heaven had wanted one immortal song."

And though Dryden's "opinion on the merits of a Chancellor may be worth little, as he probably never was in the Court of Chancery, and knew little of orders and decrees in Equity," we have no right to doubt that it was "sincere and honest;" and moreover, that it was the prevailing opinion of his time, formed by lawyers, and adopted by the community. The undisputed merit is not a mean one, that of having passed through the office at such a period, with sagacity never excelled, and with purity never suspected.

It cannot be said that Lord Shaftesbury was a professional lawyer, but his great capacity was most strikingly exemplified while sitting in the House of Lords (after he had ceased to be Chancellor,) on the Purbeck Peerage. A great point of law was made at the Bar by the Attorney General, Sir

¹ 9th vol. of his edition of Dryden's Works, p. 201.

William Jones, that honours and lands pass by the same rules and principles, and reference was had both to a dictum of Lord Coke and to the opinion of Lord Crewe and his brother Judges in the Oxford Peerage case. Lord Shaftesbury delivered a most able and learned argument in answer to the Attorney General, and his view of the law has ever since been held the sound one; and the decision come to on his recommendation, and granted on his reasoning, is the governing decision.¹

Lord Campbell gives us an interesting account of Burnel, Lord Chancellor to Edward I., and very properly attributes a great part of the merit of the reform in the law, in the reign of the English Justinian, to the advice of his Chancellor. Speaking of the celebrated Statutes of Westminster, he says: —

“Edward deserves infinite praise for the sanction he gave to the undertaking; and from the observations he had made in France, Sicily, and the East, he may, like Napoleon, have been personally useful in the consultations for the formation of the new Code, — but the execution of the plan must have been left to others professionally skilled in jurisprudence, and the chief merit of it may safely be ascribed to Lord Chancellor Burnel, who brought it forward in parliament.” Vol. i. p. 164.

Lord Campbell gives the following account of this statute: —

“The statute is methodically divided into fifty-one chapters. Without extending the exemption of churchmen from civil jurisdiction, it protects the property of the Church from the violence and spoliation of the King and the nobles, to which it had been exposed. It provides for freedom of popular elections, then a matter of much moment, as sheriffs, coroners, and conservators of the peace were still chosen by the freeholders in the county court, and attempts had been made unduly to influence the election of knights of the shire, almost from the time when the order was instituted. It contains a strong declaration to enforce the enactment of MAGNA CHARTA against excessive fines which might operate as perpetual imprisonment. It enumerates and corrects the great abuses of tenures, — particularly with regard to the marriage of wards. It regulates the levying of tolls, which were

¹ Collin's Cases of Barony by West, — Shower's Parl. Ca. 2.

imposed in an arbitrary manner, not only by the Barons, but by cities and boroughs. It corrects and restrains the powers of the King's escheator and other officers under the Crown. It amends the criminal law, putting the crime of rape on the footing to which it has been lately restored, as a most grievous but not a capital offence. It embraces the subject of '*Procedure*' both in civil and criminal matters, introducing many regulations with a view to render it cheaper, more simple, and more expeditious.

"Having gone so far, we are astonished that it did not go farther. It does not abolish trial by battle in civil suits, — only releasing the demandant's champion from the oath (which was always false) that he had seen seizin given of the land, or that his father, when dying, had exhorted him to defend the title to it. But if total and immediate abolition of this absurd and impious practice had been proposed, there would have been sincere and respectable men who would have stood up for ancestral wisdom, — asserting that England owed all her glory and prosperity to trial by battle in civil suits, and that to abolish it would be impiously interfering with the prerogative of Heaven to award victory to the just cause." p. 164, 165.

Lord Campbell continues the subject in a subsequent page:—

"All writers who have touched upon our juridical history have highly extolled the legal improvements which distinguished the reign of Edward I., without giving the slightest credit for them to any one except the King himself; but if he is to be denominated the English Justinian, it should be made known who were the Trebonians who were employed by him; and the English nation owes a debt of gratitude to the Chancellors, who must have framed and revised the statutes which are the foundation of our judicial system, — who must, by explanation and argument, have obtained for them the sanction of parliament, — and who must have watched over their construction and operation when they first passed into law. I shall rejoice if I succeed in doing tardy justice to the memory of Robert Burnel, decidedly the first in this class, and if I attract notice to his successors, who walked in his footsteps. To them, too, we are probably indebted for the treatises entitled '*Fleta*' and '*Britton*,' which are said to have been written at the request of the King, and which, though inferior in style and arrangement to Bracton, are wonderful performances for such an age, and make the practitioners of the present day, who are bewildered in the midst of an immense legal

library, envy the good fortune of their predecessors, who, in a few manuscript volumes, copied by their own hand, and constantly accompanying them, could speedily and clearly discover all that was known on every point that might arise." Vol. i. pp. 185, 186.

We have no doubt that Lord Campbell is right, to some extent, in this eulogium on Lord Chancellor Burnel. We wish, however, he had given us some authority. If speeches in parliament were necessary to carry them, they were probably made by him. But in devising and preparing these reforms, there is some ground for supposing that Edward I. was indebted, at all events in some degree, to a learned foreign jurist, whose labours are entirely unnoticed by our author. We mean the learned Franciscus Accursii, a law professor and lecturer at Bologna, with whom Edward I. became acquainted in the year 1273, on his return from the Holy Land through that city, when he immediately took Accursii into his service. He followed the King to England, and was extensively employed by him in state affairs. He was then sent ambassador to France, and in the year 1278 to the Pope Nicolas III. In the records the King calls him his "consilarius, familiaris, secretarius," also his "clericus."

In Oxford a Hall was appropriated to his use; but there is no trace of his having lectured in England. "Although," says Savigny¹, from whom we take this account, "it is not improbable that Francis was employed in the important improvements of the law of the King, yet I have not found any documentary trace of it." In 1281 he left England, and the King gave him a present of 400 marks, and not only promised a provision for his life of 40 marks, but paid it him, although somewhat irregularly.* In 1282 this learned person resumed his lectures at Bologna.

We have thus far rescued from obscurity two eminent

¹ Geschichte des Röm. R. vol. v. 281, 282, which refers to Rymer's *Fœdera*.

* Thus, in 1290 five years' arrears were paid. The sum in hand was equal to 3400 lire or 4864 thalers; the pension was 486 thalers. — Savigny, p. 282. This was a large sum in those days, and proves that law reformers were much better paid in the time of Edward I. than in the days of Victoria. It also appears that during his residence in England he remitted large sums to his wife in Italy, she declining to accompany him. — Savigny, p. 281.

law reformers: our author had previously asked who it was that had the merit or demerit of introducing the still more important change in the law in the time of William the Conqueror.

"In all history," he justly remarks, "there is not a more striking instance of subjugation: not only did almost all the land in the kingdom change hands — the native English being reduced to be the thralls of the invaders — but legislative measures were brought forward, either in the sole name of the Sovereign, or through the form of a national council under his control, seeking to alter the language, the jurisprudence, and the manners of the people. It would have been very interesting to have ascertained distinctly by whose suggestion and instrumentality the French was substituted for the English tongue in all schools and courts of justice; the intricate feudal law of Normandy superseded the simplicity of Saxon tenures; trial by battle was introduced in place of the joint judgment of the Bishop and the Earl in the county court; the separation was brought about between ecclesiastical and civil jurisdictions; and the great survey of the kingdom was planned and accomplished, of which we have the result in Domesday, 'the most valuable piece of antiquity possessed by any nation.'— (*Hume.*) But while there is blazoned before us a roll of all the warlike chiefs who accompanied William in his memorable expedition, and we have a minute account of the life and character of all those who took any prominent part in the battles, sieges, and insurrections which marked his reign, we are left to mere conjecture respecting the manner in which justice was administered under him, and the measures of his civil government were planned and executed." Vol. i. pp. 39, 40.

In a note we have the following continuation of the subject:—

"In classic antiquity lawgivers were honoured not less than conquerors, and all the most celebrated laws of Rome bore the names of their authors; but in our own history (*horresco referens*) oblivion seems to await all those who devote themselves to legal reform. We do not know with certainty who framed the statutes of Westminster in the time of Edward I., the Statute of Fines, the Statute of Uses, the Statute of Wills, or the Statute of Frauds, although they ought to have been commemorated for conferring lasting benefit on their country.

——— 'Sed omnes illacrimabiles
Urguentur, ignotique longa
Nocte, carent quia vate sacro.'

"The Grenville Act for the trial of controverted elections was the first which conferred any éclat on the name of its author, and Fox's Libel Act is almost the only other down to our own times." p. 40.

This is just. In former times every statute is associated with the monarch, and even the lawyer is apt to connect the Act with the King in whose reign it passed. We cannot help attributing the establishment of the feudal tenures to William the Conqueror, and the abolition of them to Charles the Second, although probably neither monarch knew much about the matter; probably not much more than our Sailor King did of the abolition of fines and recoveries, or our present beloved Queen of the introduction of short conveyancing forms: although had either of these last sovereigns lived at an early period, we should have doubtless heard them personally connected with these law reforms.

We may add, however, that we have very serious doubts whether the change of the law was so striking or immediate as Lord Campbell here supposes, and we shall shortly be able to give our reasons for this doubt. One advantage of this work is, that it will invite attention to the early history of our legal institutions, and the profession will begin to feel an interest in many points hitherto almost unknown even to the antiquary. Our author must expect to find many of his positions assailed, for his authority in these matters is too important, — more especially as the book is becoming a highly popular one, — to allow any doubtful points to remain unexplained or unqualified.

The whole early history of the law requires to be rewritten. Hale and Blackstone are but imperfect guides to it. With the lights which we now have, we believe it would be found, on examination, that in the reign of Edward I. the fruits of the labours of several preceding reigns were reaped. But that a series of eminent lawyers existed from the reign of William I. to that of Edward I., and that they then settled the legal institutions of this country, there can be no doubt; and we think we are now in a fair way of having tardy justice done to them.

We must now bring our present notice of Lord Campbell's

labours to a close. May the students of the Law for whose use this instructive book has been mainly written, profit by all its valuable lessons! They are entering on a career of honour or of shame: may they choose the better part! equally determined to avoid the contempt which falls on the Finches, the Coventrys, the Littletons, the Norths, who counselled the adoption of arbitrary measures, and the abhorrence which still pursues the names of Jeffries, Herbert, and Scroggs, who sanctioned and upheld them from the seat of justice.¹

¹ Since this article was printed, we have seen in the *Edinburgh Review*, just published, a very long and not a very readable article on the same subject, but not distinguished by any great learning, or indeed any kind of accuracy. There is also much commendation bestowed on the "candid, just, and generous judgments pronounced on individuals" in the work. The writer must of course mean individuals long since deceased; for there is no foundation for the eulogy as regards those not yet departed; though, as names are not given, the northern critic, probably, was not aware of the covert allusions.

The *Edinburgh Review* deserves great praise for other articles, and especially for the able and honest defence of the important bill on Charitable Trusts.

In some other respects, we find reason to complain of the *Review* for its patronage of works that sin against the rules of good and correct taste. Thus meaning to say, "What's the good of this?" or, "What use is there in this?" a writer says, "*cui bono*." (p. 496.) Now, *cui bono*? was the question put by a great Roman lawyer (Crassus) as the test for discovering who was the author of any crime committed. He asked, "Who gains by it? To whom has the act done been profitable?" Not, "What good has the act done?" much less, "Has the act done any good?" for, on the contrary, it was assumed that the act *had* done some good; and the only question was, *cui*? to whom has it done good? It has been omitted to note a most singular note in Vol. i. p. 295. of Lord Campbell's book, as to which, we think, there must be some error of the press. Lord Campbell expresses his respect for the memory of William of Wickham, which, he says, he feels, because to the Winton foundation we owe Baron Rolfe and Professor Empson!

ART. II. — THE LAW OF ESTATES.

No. I. — ESTATES IN FEE-SIMPLE.

It has ever been considered one of the great advantages of our constitution, that by means of its ordinary powers it can adapt itself to altered circumstances ; and this more especially applies to the history of our laws. From whatever source the disease may proceed, whether from the exercise of arbitrary power, or from a rule once good becoming no longer applicable to the wants of the times, a remedy has hitherto been usually found without calling for any extraordinary exertion of authority. Different modes of treatment have been pursued ; at one time parliament has interfered by direct legislation on the particular point ; at others it has entrusted large powers to the judges to make the necessary changes ; and on some remarkable occasions the judges, without any such powers, have changed or created the law, either boldly leading the way, or forced on by that silent but irresistible current of opinion that has long been omnipotent in this country. Thus, hitherto, the *vis medicatrix* has been found sufficient.

These remedies have all been extensively employed of late years, and the consequence has doubtless been to place the law in a state of considerable confusion ; neither can we expect that this will immediately subside. The lawyer now regards the books on his shelves with doubt, if not with disfavour ; they no longer contain the true oracles of the law ; he fears to increase them lest he add to his troubles, and he looks about almost in despair for some one who will tell him what is the actual law which is to guide him.

Under these circumstances, we trust it will not be considered presumptuous in us to make an attempt, with such resources as are available to us, not to throw any new light on the old rules, but simply to state which of them in our opinion remain unaltered ; and we prefer commencing our disqui-

sitions in this direction with the law relating to property; and, wishing to give them, as far as possible, a practical character, we shall, in the first place, consider the LAW of ESTATES.

In doing this, we fear we must necessarily travel over some ground familiar to most of our readers; but, in endeavouring to lay down these rules, we shall, as far as possible, avoid all exploded law, and all doubtful questions not bearing on actual practice.

First, then, let us see what an estate is.

State, or estate, says Lord Coke¹, signifieth such inheritance, freehold, term for years, tenancies by statute merchant, staple, *elegit*, or the like, as any man hath in lands or tenements, &c. And by the grant of his estate, &c., as much as he can grant shall pass²; and again³, *Status dicitur a stando*, because it is fixed and permanent.

In *Bridgwater v. Bolton*⁴, Lord Holt enlarged this definition, and said that the word estate was *genus generalissimum*, and included all things real and personal. Sir J. Jekyll, M.R.⁵, following Lord Holt's decision, said that the word comprehended not only the thing, but also the interest in it.

The word *estate*, then, is an important one, and it has an emphatic meaning in the law which is often of especial importance in the construction of wills.⁶

Thus, this word is applicable both to real and personal property⁷, and the authorities to which we have referred seem to establish that it is applicable to any interest whatever that a person has in either kind of property. It may further be laid down to be applicable to what is called "a possibility coupled with an interest" (now a statutable phrase⁸) which has

¹ Co. Litt. 345. a.

² See *Randall v. Tuchin*, 6 Taunt. 410.

³ Co. Litt. 9 a.

⁴ 1 Salk. 236.

⁵ *Barry v. Edgeworth*, 2 P. Wms., 523.

⁶ In a deed it has not so much meaning. There is a familiar common form called the clause "*all the estate*," which custom has long introduced after the description of the parcels. When so inserted it has been held to have little or no use or meaning. *Derby v. Taylor*, 1 East, 502. In conveyances under 8 & 9 Vict. c. 119., it is implied.

⁷ And note that the words *personal estate* will pass freeholds, if it appear that the testator used them in that sense. *Doe v. Tofield*, 11 East, 246.

⁸ 8 & 9 Vict. c. 106. s. 6.

been recently made alienable by deed. "There are two kinds of possibilities," says Lord Kenyon, C. J.¹, "the one a bare possibility, that which the heir has from the courtesy of his ancestor, and which is nothing more than a mere hope of succession. Such a possibility undoubtedly is not the object of disposition, for if the heir were to dispose of it during the life of the ancestor, though it afterwards devolved on him from the ancestor, such disposition would be void."² An instance of the other may be found in *Doe v. Tomkinson*³; where there was a devise by a testator of all his real and personal estate equally to his sisters M. and E., *or to the survivor of them*, and to be disposed of by the survivor as she may by will devise; Lord Ellenborough, C. J. distinctly called this contingent interest "an estate."

Having now endeavoured to ascertain what an estate is, we propose to consider the nature of estates with respect to the *quantity* of interest which the owner has in them. Estates, then, viewed in this light, are either limited or unlimited. The only unlimited estate is an estate in fee *simple*. A limited estate may be a *qualified* fee simple, or it may be an estate in fee *tail*; or it may be for the *life* of a man; or for *years*; or it may be holden at the *will* of another; or merely only by *sufferance*. All these estates in land are recognised by the law, and have their respective incidents and distinctions.

Estates are also estates at the common law; estates under the statute of uses, and trust or equitable estates. Again, estates are of the tenure of common socage or freehold estates; or they are of customary or base tenure. But these distinctions relate to the *quality*⁴ of estates.

Unless it is expressly noted, it is our present purpose to treat only of *legal* estates in *freehold* lands.

In describing an estate in real property, it is necessary to use the word "tenant"; which, according to Lord Coke, has in the law five significations. But the second which he mentions is sufficient for our purpose: "He is called tenant

¹ 2 T. R. 93. But see 2 P. Williams, 181. 191.

² *Sed quare* as to the doctrine of *estoppel*, hereafter to be treated of.

³ 2 M. and S. 170.

⁴ We know that the *quality* of an estate has usually been treated of differently. See 1 Prest. Est. 7.

or holder, because all the lands or tenements in England in the hands of subjects are *holden* mediately or immediately of the King; for in the Law of England we have not properly *allodium*, that is, any subject's land that is not holden, and he is called a tenant because he holds it of some superior lord by some service. And therefore the King in this sense cannot be said to be a tenant, because he hath no superior but God Almighty, *prædium domini regis est directum dominium cuius nullus autor nisi Deus*. But though a subject hath not properly *directum*, yet hath he *utile dominium*." And he is indeed for all practical purposes the owner of the land.

It is further to be observed, that, by the Statute of Quia Emptores (18 Edw. I.) it is enacted (c. i.) that it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part thereof; so 'nevertheless that the feoffee shall hold the same lands or tenements of the same chief lord of the fee, and by the same services and customs, *as his feoffor held them before*; and (c. ii.) that if he sell any part of such his lands or tenements to any person, the feoffor shall hold that part immediately *of the chief lord*, and shall be forthwith charged with so much service as pertaineth or ought to pertain to the said chief lord, for such part, according to the quantity of lands or tenements so sold. Thus: if A. sells land to B., A. does not hold the land of B., but of the same seignory to which the fee immediately belonged, when the statute passed¹, that is to say, *in most cases* of the Queen. An illustration of this rule is to be found in the enfranchisement of land under the Copyhold Act, 4 and 5 Vic. c. 35., by which statute (s. 81.), after the execution of the conveyance, the lands enfranchised "shall become and be in all respects of freehold tenure." In this case such lands are no longer holden of the lord of the manor, but in all usual cases of the Queen.

There are two qualities essentially requisite to the existence of a freehold estate. I. Immobility² that is, the subject matter must either be land or some interest, issuing out of or annexed to land.

¹ Bradshaw v. Lawson, 4 T. R. 443.; Co. Litt. 684.; Harg. note (5.)

² 2 Com. 386.; 1 Com. Dig. 56.

But the estate may be variable as to *place*, for it may be moveable sometimes in one person, and *alternis vicibus* in another; nay, sometimes in one place, and sometimes in another. As for example: if there be eighty acres of meadow which have been used time out of mind of man, to be divided between certain persons, and that a certain number of acres appertain to every of these persons, as, for example, to A. thirteen acres, to be yearly assigned and lotted out, so as sometimes the thirteen acres lie in one place and sometimes in another; and so of the rest; A. hath a moveable fee simple in thirteen acres, albeit they have no certain place, yet yearly let out in several places, so as the number only is certain, and the particular acres or place wherein they lie after the year uncertain.¹

This kind of holding, although not usually mentioned in legal treatises, is still common in some parts of England, more especially in the northern and midland counties.²

II. A freehold estate must also have a sufficient legal indeterminate duration; for if the utmost period of time to which an estate can last is fixed and determined, it is not an estate of freehold.

Thus, if lands are conveyed to a man and his heirs for ever, or for the term of his natural life, or for the term of another's life, or until he is married or goes to Rome, he has an estate of freehold; but if lands are limited to a man for 500 years, or for 99 years, if he shall so long live, he has not an estate of freehold³, and the law was precisely the same when Bracton wrote.⁴

Having now laid down some rules as to estates in freehold lands in general, we proceed to mention those which relate to the several kinds of estates; and, first,

I. OF ESTATES IN FEE SIMPLE.

And here we propose to consider—*First*, what an estate in fee simple is. *Secondly*, how an estate in fee simple may

¹ Co. Litt. 4 a. *Weldan v. Bridgewater*, Cro. Eliz. 421.

² See the Evidence before the Select Committee on Inclosures (House of Commons), 1844. p. 27.

³ Co. Litt. 42 a.

⁴ 207 a. 1 Cru. Dig. 56.

be acquired. *Thirdly*, how it may be held or enjoyed; and, *Fourthly*, how it may be aliened.

And, *first*, what it is.

The highest, the most complete, and largest estate which can exist by the English law, is called an estate in fee simple. "Tenant in fee simple," says Littleton¹, "is he which hath lands or tenements to hold to him and his heirs for ever, and it is called in Latin *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say lawful or pure; and so *feodum simplex* signifies a lawful or pure inheritance."²

Fee cometh from the French *fief*, i. e. *prædium beneficium*, and legally signifieth inheritance, as our author himself expoundeth it; and simple is added, for that it is descendible to his heirs generally, that is, simply³, or in the words of Bracton⁴, "*simplex donatio et pura est ubi nulla addita est conditio sive modus simplex enim datur quod nullo additamento datur.*"

Taking, therefore, a fee in this sense as a state of inheritance, it is applicable to, and may be had in any kind of hereditaments, either corporeal or incorporeal.⁵ But there is this distinction between the two species of hereditaments; that of a corporeal inheritance, a man shall be said to be seised in his demesne as of fee; of an incorporeal one, he shall only be said to be seised as of fee not in his demesne⁶, for which Blackstone⁷ gives this reason from the Civil Law; that as incorporeal hereditaments are in their nature collateral to, and issue out of lands and houses, their owner hath no property *dominium* or demesne in the thing itself, but hath only some-

¹ Littleton has been censured by Wright (Ten. 149.), for annexing an improper meaning to the word *feodum* in his definition, and it has been contended that that word signifies land holden of a superior lord by military or other services. But although this was certainly the original meaning of the word, yet when the feudal law was fully established here, and it was universally acknowledged that all the lands in England were held mediately or immediately of the Crown, the word *feodum* or fee, became generally used to denote the quantity of estate or interest in the land. Bract. 263. b. 1 Cru. Dig. 64.

² S. 1.; Co. Litt. 1 a.; Litt. s. 11.; Co. Litt. 4 a.

³ Co. Litt. 1 a.

⁴ Lib. 2. c. 39. fo 92.

⁵ Flet. l. 5. c. 5. s. 7.

⁶ Litt. s. 10.

⁷ 2 Com. 106.

thing derived out of it resembling the *servitudes* or services of the Civil Law. The *dominium* or property is frequently in one man, while the appendage or service is in another. Thus Gaius may be seised *as of fee* of a way leading over the land of which Titius is seised in his demesne *as of fee*.

A man may also have a fee in personalty, as in an annuity or a dignity.¹

Whenever a person grants an estate in fee simple, he cannot make any further disposition of it at the common law, because he has already granted away the whole interest, and therefore nothing remains in him. An estate in fee simple may however be granted on condition, and in deeds deriving their effect from the statute of uses, and in devises by will, an estate in fee simple may be rendered defeasible on the happening of some future event.²

And where it is said in any book that a man is seised "in fee," without more saying it shall be intended "in fee simple;" for it shall not be intended by this word (in fee) that a man is seised in fee tail, unless there be added to it this addition, *fee-tail*.³

Where an estate of inheritance has a qualification annexed to it, by which it is provided that such estate must determine whenever that qualification is at an end, it is then called a qualified or base fee, as in a case put by Lord Coke, of a grant to a man and his heirs, *tenants of the Manor of Dale*; whenever the grantee or his heirs cease to be tenants of the Manor of Dale⁴ the estate will cease, but during the existence of the estate the owner of the qualified or base fee has the same rights and privileges over his estate until the qualification upon which it is limited is at an end as if he were tenant in fee-simple.⁵

A qualified or base fee may be derived out of an estate tail, as where tenant in tail levied a fine to a stranger without suffering a recovery, he had an estate in fee simple as long as tenant in tail had heirs of his body.⁶ So when tenant in tail attempts to convey a fee simple by lease and release or other *innocent* conveyance, as it is called, a base fee is

¹ Co. Litt. 2 a.

² Litt. a. 293.

³ 1 Cru. Dig. 24.

⁴ 1 Cru. Dig. 64.

⁵ Co. Litt. 27 a.

⁶ Seymour's case, 10 Rep. 97.

created; and it has been recently enacted, that when an estate tail shall have been barred and converted into a base fee, such base fee may be enlarged into an estate in fee-simple.¹

Secondly, How a fee simple is acquired. "If a man," says Littleton², "would purchase lands or tenements in fee simple, it behoveth him to have these words in his purchase, 'to have and to hold to him and to his heirs,' for these words (his heirs) make the estate of inheritance. For, if a man purchase lands by the words, 'to have and to hold to him for ever,' or by these words, 'to have and to hold to him and his assigns for ever;' in these two cases he hath an estate for life, for that there lack these words (his heirs), which words only make an estate of inheritance in all feoffments and grants."

"Littleton here," says Lord Coke³, "putteth lands but as an example; for his rule extendeth to seignories, rents, advowsons, commons, estovers, and other hereditaments of what kind soever." "And it is to be observed," he continues⁴, "that every word of Littleton is worthy of observation. First, *heirs* in the plural number, for if a man give land to a man and to his *heir* in the singular number, he hath but an estate for life, for his heir cannot take a fee simple by descent, because he is but one, and therefore his heirs take nothing." But this is too generally laid down, for according to many authorities cited by Mr. Hargrave⁵ in his note on this passage, *heir* may be *nomen collectivum* as well in a deed as a will, and operate in both in the same manner as *heirs* in the plural number.

Also, says Lord Coke⁶, "observable is this conjunctive (*et*); for if a man give lands to one to have and to hold to him or his heirs, he hath but an estate for life for the uncertainty." But perhaps the leaning of the Courts would now be to construe the *or* into *and*.⁷ If a man give lands unto two "to have and to hold to these two *et hæredibus*

¹ 3 & 4 W. 4. c. 47. s. 19.

² Co. Litt. 4 a.

³ Note 4. 8 b.

⁷ See 5 Rep. 112. Plowd. 286. 289.

² S. 1.

⁴ Ib. 8 b.

⁶ Co. Litt. 8 b.

omitting *suis*, they have but an estate for life for the uncertainty.”¹

Littleton here only treats of purchases by natural persons, and not of bodies politic or corporate, for if lands be given to a sole body politic or corporate, then, to give him an estate of inheritance in the politic or corporate capacity, he must have these words, “to have and to hold to him and his successors,” for without this word *successors* there passeth no inheritance, for as the heir doth inherit to the ancestor, so the successor doth succeed to the predecessor.²

But this rule is not nearly so stringent, for a fee will pass to a corporation *aggregate* without the words *successors*, and sometimes even to a corporation sole³, although the word *successors* in both cases is usually inserted.

“This very great nicety,” says Blackstone⁴, “about the insertion of the word ‘heirs’ in all feoffments and grants in order to vest a fee is plainly a relic of the feudal strictness, by which it was required that the form of the donation should be punctually pursued. For as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee’s estate in the land extended only to his own person and subsisted no longer than his life, unless the donor by an express provision in the grant gave it a longer continuance and extended it also to his heirs.” Lord Coke, however, gives a reason which, though more general, appears to us more correct. “The reason wherefore the law is so precise to prescribe certain words to create an estate of inheritance is, for avoiding of uncertainty, the mother of contention and confusion.”⁵

It will be seen that Littleton mentions also that this rule as to limitations of estates is applicable only to “feoffments and grants.”

Lord Coke⁶ notices some exceptions which obtained in his time. First, as to wills and testaments; “for thereby, as

¹ Co. Litt. 8 b.

² Ib.

³ Co. Litt. 94 b. and Vin. Ab. Estate, c.; Harg. n. 7. 8 b.

⁴ 2 Com. 108.

⁵ Co. Litt. 9 a.

⁶ Co. Litt. 9 b.

Littleton himself after saith, an estate of inheritance may pass without these words (his heirs),” which exception lets into the construction of the will the intention of the testator, and many decisions are to be found containing much judicial conflict as to this: which is now set at rest as to wills coming into operation after the first day of January, 1837, by the enactment of the stat. 1 Vict. c. 26. s. 28., which provides that where any real estate shall be devised without words of limitation, it shall be construed to pass the whole interest which the testator had the power to dispose of, unless the contrary intention should appear in the will.

Another exception to this rule was in respect of fines and recoveries when these assurances existed, and still applies to them so far as they are in force.

Nor did the rule apply to certain releases; as, “First, when an estate of inheritance passeth and continueth; as, if there be three coparceners or joint-tenants, and one of them release to the other two, or to one of them generally, without this word (heirs), by Littleton’s own opinion they have a fee-simple.¹ 2. By release, when an estate of inheritance passeth and continueth not, but is extinguished; as when the lord releaseth to the tenant or the grantee of a rent, &c. all his right, &c., whereby the seignory, rent, &c. are extinguished for ever, without these words.” 3. Neither does this rule apply to creations of nobility by writ.

These are the exceptions, and there are some others mentioned by Lord Coke², but in the construction of all lawful assurances *inter vivos*, it may be laid down generally that the rule applies.

If the gift were “to you for your life, and after your decease to A. and his heirs,” or “to you for twenty-one years, and subject to that estate to A. and his heirs,” or “to you and the heirs of your body (which would constitute an estate tail), and upon your decease and failure of your issue, to A. and his heirs.” In any of these cases, A. would take an estate in fee simple, giving him a right to the possession of the land upon the death of the feoffee, or the

¹ Co. Litt. 9 b.

² Ib.

expiration of twenty-one years, or the extinction of the, feoffee and his issue.¹

When a fee simple or other freehold estate is conveyed to a person by feoffment with livery of seisin, or by any of those conveyances which derive their effect from the statute of uses, or by grant under stat. 8 & 9 Vict. c. 106, he acquires a seisin in deed and a freehold in deed. But when a freehold estate comes to a person by act of law or by descent, he only, until recently, acquired a seisin in law, that is, a right to the possession of his estate, now called a freehold in law; for he must have made an actual entry on the land to acquire a seisin and a freehold in deed. Until entry the heir had not *plenum dominium*, or full and complete ownership; he had not actual seisin, and the rule was in every case *non jus sed seisinam facit stipitem*.² And this is still the law with respect to descents which have taken place on the deaths of persons who have died before the first day of January, 1834. But where the death has taken place after that period, the law has been altered by stat. 3 & 4 Will. 4. c. 106., which enacts (s. 1.) that in the construction of that act the expression "person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain possession, or receipt of the rents and profits thereof; and by s. 2. "the person last entitled to the land" shall be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same.

Thirdly, How a fee simple may be enjoyed. A tenant in fee simple is the absolute master of all houses and other buildings erected on the land, as also of all timber growing thereon, for trees are considered as parcel of the inheritance; and the law does not favour the severance of them from the freehold, because they would be thereby wasted and destroyed. He is also entitled to all mines of metal, both gold and silver, and to dig up and dispose of all minerals and fossils which are under the land.³

An unqualified estate in fee simple is that which gives its

¹ Burt. Comp. 10.

² Flot. 1. 6. c. 2. s. 2.

³ 1 Cru. Dig. 64. Lyddall v. Weston, 2 Atk. 19.

owner the fullest power of disposing of the tenement which the law allows, and not being disposed of by him it descends to such person or persons among his kindred as the law marks out to be his heir, but which includes all collateral as well as lineal heirs. Blackstone falls into a slight inaccuracy as to this when he says¹, "that the estate goes to his heirs generally, without mentioning *what* heirs, but referring that to his own pleasure, or to the disposition of law." A tenant in fee simple may during his life convey his estate, or by his will he may devise it after his death to any person he chooses, in which case such person takes as his assign, but unless he exercises these powers, the estate goes to his *heirs* according to the rules of law.² In this there is a marked distinction between our law and the Roman law, under which the owner of lands could institute his own heir.³

An estate in fee simple is subject to the dower of the tenant's wife, and to the curtesy of the tenant's husband; as we shall hereafter see when we come to treat of these estates.

Fourthly, How an estate in fee simple may be aliened. A tenant in fee simple has an absolute power of alienation, and any restriction of this power annexed to the creation of this estate is absolutely void and of no effect.⁴

A tenant in fee simple may also create any less estate than his own; and thus a custom that a tenant in fee simple cannot demise his lands for more than six years is void, because it is contrary to the freedom of the estate of one who hath a fee simple.⁵

But a grant or devise may be made to a man upon condition that the grantee or devisee shall not alien to a particular person (naming him), or to any of his heirs, so as that the condition does not take away all power of alienation.⁶

For some centuries before the reign of Henry VIII. (when new modes of conveyance were introduced), an estate in fee-

¹ 2 Com. 104.

² See Butl. Co. Litt. 191 a. vi. 3.

³ Ib. Inst. ii. 14. 1-9.

⁴ Gill v. Pearson, 6 East, 173.

⁵ Salford's case, Dy. 357 b.

⁶ Litt. s. 361.; Gill v. Pearson, 6 East, 173.

simple might be transferred from one person to another by the delivery of some symbol of possession, as a turf, or wand, &c. upon the lands, attended with apt words.¹ This species of conveyance, which is still in use, is called a feoffment. It now always consists of two distinct acts, viz. the ceremony of delivering possession commonly called *livery of seisin*; and the written explanation of it which was required by the Stat. of Frauds (29 Car. 2. c. 3.) to be signed by the feoffor, and which must now, by stat. 8 & 9 Vict. c. 106. s. 3., be by deed under the seal of the feoffor, except when the feoffment is made under a custom by an infant.

The words necessary for conveying a fee simple may be reduced to this short form: "I give this land to you and your heirs."² If the gift were simply "to you for your life," the reversion in fee simple would remain in the feoffor. An estate in fee simple may also be aliened by several other assurances, of which we shall hereafter treat. By far the most usual has been until recently the lease and release, which by the recent statute³ has now been greatly superseded by the *grant*.

So much for voluntary alienation: but there is also an alienation which may be involuntary, to which lands held in fee simple are now fully liable. They are subject, not only to the special, but to the simple contract debts of the tenant.

In his lifetime they are liable to be taken in execution for his judgment debts. The writ of *elegit*, under which this is done, is as old as the reign of Edward I.⁴; but this only extended, until the present reign, to one half of the land of the debtor. But by the stat. 1 & 2 Vict. c. 110. s. 11. the whole of the lands of the debtor may be taken under the writ of *elegit* now issued.

And the lands of the tenant may, after his death, be administered in the Court of Chancery for the benefit of even his simple contract creditors. This rule was, early in the present century, established, where such tenant was a

¹ Co. Lit. 48 a.; 496 a.; Burt. Comp. 7.

² Burt. Comp. 7.; as to the word *heirs*, see *ante*, p. 40.

³ 8 & 9 Vict. c. 1

13 Edw. I. c. 18.

trader¹; and subsequently, by stat. 3 & 4 Will. 4. c. 104., it was enacted, that when any person shall die seised of any real estates, whether freehold or copyhold, the same shall be assets for the payment of all his just debts, as well due on simple contract as on specialty. Under this act the real estate of all debtors may be administered in the Court of Chancery for the payment of debts.

ART. III. — RECOLLECTIONS OF A DECEASED WELSH JUDGE.

No. III.

THERE was a great charm about the old Welsh circuits. When the English Judges have been there a year or two, I dare say that all will go on in the usual routine of an English circuit. But in my time it was very different. The whole appearance of the Court was different from an English court; the habits of the people, and even their dress, were distinct; and then, as in most cases the witnesses could not talk English, and had to be examined by an interpreter, you might well fancy yourself in a foreign country. Indeed, in addressing the jury, whether by the Bar or from the Bench, it was but too obvious that the majority frequently understood but little of what was said to them. In the North the dialect of the witnesses was occasionally puzzling enough. We used to hear people talk of the *house* or the *house-parts*, meaning the kitchen; of a *midden-stead*, for a dunghill; of a *stec*, for a ladder; of *lating*, for reckoning; and *laking*, for playing; nay, of *darrock*, for day's work; and a *trewthsin* for a three weeks since. But in Wales there was much less in common between the natives of the country and the Professors of the Law brought into the country to administer justice. This sometimes led to some odd mistakes: take, as an example, the jury which, after hearing a

¹ 47 Geo. 3. c. 74.; reenacted and extended by 1 W. 4. c. 47. s. 9.

trial for sheep-stealing, in which the facts were, that the sheep had been killed on the hill, and there skinned, the robber taking away the carcass, and leaving the skin for fear of detection — all this was proved in evidence, but the jury supposed it to relate, not to a sheep but to a human being, and brought in, after some hesitation, what they considered a safe verdict of *manslaughter*!

There was indeed a genuine simplicity in some parts of the country which, I fear, will soon depart from the land altogether. Let me give an instance. Two of my brother Judges, for both used generally to sit, actually tried this action of assault. In a certain parish in Cardiganshire a dead body of a new-born child had been found. The overseers considered this a stain on their territory: they consulted together; they summoned the gossips of the neighbourhood; but they could find no clue to the mother. They then hit, I presume with the concurrence of the magistrates, on this notable expedient: they issued written notices to all women between the ages of fourteen and fifty living within ten miles of the place where the body was found to appear at the market-house at a given day and hour, and be examined by a surgeon as to their state of health, it being supposed that the mother would thus certainly be discovered. Strange to say, every woman, amounting in number to more than a hundred, actually appeared, and were examined. Only one, indeed, refused, whereupon the overseers and surgeon proceeded to her house, and attempted a forcible examination; and hence the action for assault, and the divulging to all the rest of the Principality these strange circumstances. The poor woman who brought the action recovered damages of course, which were, however, only small, and the mother of the child remained undiscovered.

Another circumstance connected with the administration of justice in Wales was the influence of particular counsel — not over judges, for that is common enough in England — but over *juries*. Few persons ever obtained this influence, who were not Welshmen, and few Welshmen ever obtained the influence of John Jones of Ystrad¹, for many years

¹ Subsequently M. P. for Carmarthenshire. He died in the year 1842. — Ed.

member for Carmarthen. He was a man of great natural ability, although not of very cultivated talents. He had considerable property, but chose to practise as a barrister on the circuit, and thus kept up and extended his fame. He knew most of the jurymen by sight and name, and they all knew him; he could talk Welsh, and he did not hesitate occasionally to throw in a Welsh sentence or two in the course of his address. His power of obtaining verdicts was almost unexampled; and on one occasion, it is a fact beyond dispute, that a jury, instead of finding for the party, plaintiff or defendant, as the case might be, for whom Mr. Jones was counsel, brought in a verdict "for John Jones."

Speaking of a great power of obtaining verdicts naturally reminds me of another Welsh Circuit friend, and indeed Judge, my witty and lamented colleague, Clarke. No man, I believe, was a greater verdict-getter than Nathaniel Gooden. He positively would not be refused. I have heard of him on his circuit, the Midland, as almost unrivalled in this respect. But certain it was not by his depth of law; for it was told of him, that, at a consultation once, some one said, "Oh, sir, they" (the defendants) "say, it is a Remitter," — "Oh! the scoundrels," (answered he) "they'll say any thing." He was one of the most consistent High Churchmen, and High Tories, I have ever known. When men quitted, as rarely happened in those days, the Tory party, Clarke would really look aghast, as if they had committed some horrible and atrocious offence, which he could not screw up his mind to believe. But when the change happened to be in the opposite direction, and any one came over to the Tory side, nothing could be more placable; nay, he treated them with a kindly and encouraging aspect as men who saw the line of their duty and followed it.

He was great in the Exchequer, his own walk, where he really was, as it were, the cock. I have seen him sitting by his junior Walton, who had put some such utterly illegal question, as "What did you hear the man say about what he had heard in the neighbourhood of the Gang of Smugglers?" When an objection was instantly taken on the

other side, and Walton gave up the question. "Put the question;—repeat your question, Mr. Walton," growled Clarke; "we always put that question here." However, my Lord Chief Baron allowed it not, and then we saw Clarke's eyes uplifted, and his hands thrown up, as if the spirit of improvement, and réform, and innovation, and any other "thing most abhorred of Tories," had at length reached the place he had hoped was sure to be the longest free from such inroads,—the Bench of the Exchequer.

Clarke had a certain kind of common sense which, set off by his great warmth of manner and fine portly figure, gave great weight to his words, and well supplied the place of a more finished eloquence. Any approach to a pleasantry he was very far indeed from ever making; it would have detracted from the perfect seriousness with which he ever entered into his client's case: very different from Vaughan, who, not merely when called upon to laugh the adverse case of the plaintiff out of Court, but also when of counsel with the plaintiff, would often perform that office. Yet Clarke, all unintentionally to create a laugh, and not very fond of any such testimony to his powers, would now and then make his audience merry without meaning it. As when the opposite Counsel had been pathetic on his orphan client's hard lot, "Gentlemen," said Clarke, "why, I am myself an orphan,"—he was seventy odd years old,— "People's fathers and mothers cannot live for ever." No one can doubt of the pathos raised before being suddenly dissipated by this unexpected sally,—not of humour, but of mere anger at any pathos having been imported into the cause. So when a witness whom he was pressing with his angry, and oftentimes scolding, cross-examination, suddenly dropped down in a fit, and some said it was apoplectic,—but privately Clarke heard it was epileptic, "My Lord," said he, "it's only epilepsy,—she must answer the question," as if the Courts had taken a distinction between apoplexy and epilepsy.

In my early days on the Northern Circuit (*the Circuit*, as we used to term it, for it was in truth equal to nearly all the rest put together,) I remember once a certain Will Lowndes, an original in some respects, and then disagreeable. He

was excessively proud, being descended from the celebrated secretary of the treasury in King William's time; but he pretended to no knowledge whatever of finance beyond that of common arithmetic—the plainest propositions of which, however, he was quite ready to dispute, if any young man should venture in his presence to give an opinion that two and two made four. His temper was dogged, rough, and irritable; and he took a pleasure in both saying and doing ill-natured things, wherefore when the wags of our Bar chose to play a trick on Boswell (or as he called it “ran their base humour on him”) by sending him two briefs, one in trover for an estate, the other in ejectment for title deeds, Will Lowndes readily lent his name as the leader with whom Bozzy was to be. The latter entered Court immediately after the delivery of the precious documents, the first and the last he ever saw marked with his name, and with that of an attorney said to live at *Humtown*, North Riding. The conspirators, well pleased, marked his all-important and self-sufficient air, and how he pressed through the crowd of briefless juniors regarding them with compassion. It was all but expected he would claim a bag from some leader, and when he was observed to sidle up towards Law, a privy if not a party to the jest, the whisper ran round our table that he had asked a bag. It was, however, not so, he only was mentioning the curious point which arose upon the case of *Hox v. Gull*, in which conversion of a freehold was alleged; and Law said, the point being new, he recommended him to consult old Lamb, who had been his pupil, and was a sound lawyer as well as a good pleader. To Jemmy's annoyance the records, if ever entered, were withdrawn, and he knew the real extent of his good fortune only from the attorney general of the circuit at the next grand night at Lancaster.

One night a very happy guess was made by Lowndes. Old Raine, father of my colleague Jonathan, and of Dr. Mathew, was a country schoolmaster, but of respectability, and having given up school-keeping, had been raised to the summit of his ambition by being put in the commission. He was as crusty of temper as Lowndes himself, but had less of a gentleman in his manner. Lowndes happened to come

into a box at the theatre in York where Raine had usurped the place of the lady on Lowndes's arm, whereupon a dispute arose, in the course of which Raine somewhat roughly asked Lowndes "if he knew who he was speaking to?" Lowndes had not the least knowledge of the kind, nor the least care about the matter, and he quickly made answer—"No, indeed—but from your manner I should not wonder if you were a sulky fellow of a justice whom they call Old Raine."

The first time the ex-schoolmaster sat in judgment, a man was tried before the sessions for robbing a hen-roost, and acquitted for want of evidence against him. The chairman was ordering him to be discharged as a matter of course; but Raine said, though he fully agreed, yet he conceived it would be well to have him first whipt. The other justices repressed this ebullition of professional zeal, and explained the difference between justices and schoolmasters in respect of whipping.

Lowndes was afterwards taken up by Mr. Pitt and G. Rose, and placed at the head of the department of taxes, established to superintend the increased revenue system. I have heard that he was found to be inexpressibly troublesome to the Treasury and to his superiors of all kinds, and to his colleagues, and to all his inferiors, and to all with whom he came in contact, by which in his case was meant conflict. But he also had one quality wholly invaluable in that department. He was entirely without compassion, and took more delight in rejecting all applications for remission and relief, and even for justice, than others did in yielding to the feelings which such applications address. He was a strictly honourable man, and held it wholly unworthy of a man at all to let any consideration interfere with the punctual and rigorous discharge of his duties—these duties, however, being rendered far more easy to him than they would have been to most others by the natural hardness of his disposition. He was, nevertheless, quite capable of kind acts and of generous sacrifices, which showed that the roughness of the outside came from temper, and not from want of heart. He remained in the tax department until 1816, when a heavy blow was levelled at him by the repeal of the property tax,

and still more by the motion for destroying all the returns. When some moved to have them burnt by the hands of the common hangman, Lowndes dryly observed that he cared not whose hands were employed to do so foul a deed; but he knew some folks who should be in these same hands if all had their deserts. He soon after retired from public life as if (in Hume's expression) "unable or unwilling to survive his beloved"—impost.

ART. IV. — BAVARIAN CRIMINAL PROCEDURE, AND REMARKABLE TRIALS.

Narratives of Remarkable Criminal Trials, translated from the German of ANSELM RITTER VON FEUERBACH. By Lady DUFF GORDON. 8vo. Murray, 1846.

THIS volume is not merely to be considered as a collection of remarkable trials. It has been treated if not intended as having a somewhat higher aim; to some extent it is an introduction to the English pleader of the mode of procedure enforced by the Bavarian criminal code; and there are some indications not only of a comparison of it with our own to which no one can object, but of an apparent preference given to it as the result of that comparison.¹ It is one of the

¹ See Edinburgh Review for Oct. 1845. art. 2., in which Feuerbach's original work is reviewed with reference to our own system of Procedure, without censure if not with praise. Far more to our taste is an article in the Number for January last on Scottish Criminal Jurisprudence, which with great justice points to the obligations which English law reformers are under to the Scottish system of jurisprudence in many late reforms. We are bound to acknowledge this to be true, and we hope to see the day when there will be one uniform law in all the three kingdoms, and we invite the co-operation of our Northern brethren to obtain this object. Much of the Scottish law of property appears to us in a confused and barbarous state, and we fear that some of the Scottish lawyers cling to these errors with greater pertinacity than we who live south of the Tweed. Free discussion is what is first wanted, with a proper knowledge of both systems, and next, the unprejudiced preference of that which is best, whether it be Scotch or English.

objects of this work to bring under the notice of our countrymen the stores of foreign jurists, and we trust that having already shown ourselves no bigoted devotees of our own legal institutions, we shall be quite willing to adopt any of their laws or regulations which appear to us on proper inquiry to be better than our own. We hope, however, to satisfy our readers that in Criminal Procedure, so far as it is illustrated by this volume, we are far in the advance of our Bavarian brethren. Let us, however, not do injustice to a learned, amiable and most zealous law reformer, from whose official reports these trials are selected—ANSELM VON FEUERBACH, “a man” to quote the words of the preface, “celebrated as a judge, a legislator, and a writer.” We shall from our own sources of information endeavour to make his efforts known to the English reader; but having done this, we shall also be able to show that although he was far in advance of his own age and countrymen, he had not attained to the light which we enjoy on Criminal Procedure. This is very excusable in him, but it would be very inexcusable in us if we were on this point to retrograde.

In a period when great reputations are of rare occurrence, Anselm von Feuerbach shines forth, both as a jurist of a very high order, and a man of diversified pursuits, as will be shown when we state that he employed his spare time in the translation of the commentary on the *Sanscrit* poem “Gita Gowinda.” Feuerbach, as is not unusual with German lawyers, passed the first years of mature age as the pupil of the German philosopher, Reinhold, and the works of Kant, Locke, and Hume, were those that he principally studied, and which, there can be no doubt, gave direction and impulse to his mind. His very first attempts were such as lead to the indication of the *principles* on which law, the science of law, judicial procedure, and its corollaries are based; and it may be interesting to know that it was Hobbes whose bold axioms Feuerbach first attacked. Thus appeared, amongst the earliest of his works, “Anti-Hobbes, or on the Limits of Civic Authority, and the coercive Powers of Citizens towards their Rulers.” Erfurt, 1798.

But Feuerbach was not destined to lead a mere contemplative life. He knew too well that the *fulcrum* of man's exertions is to be found somewhere; and his "Enquiries on the Crime of High Treason" (Erfurt, 1798.) placed him at once among the honourable phalanx of thinking criminal jurists, and procured him a professorship of Law at the University of Jena, where, at that period, Goethe, as Secretary of State at Weimar, took an interest in, and vivified every thing into which *life* could be possibly infused. In this situation Feuerbach produced his "Manual of the Common Criminal Law of Germany" (Lehrbuch des gemeinen in Deutschland geltenden peinlichen Privatrechts. Giessen, 1801). It went through *nine* editions (last in 1826, a success equalled by no other criminal text-book,) and placed our author at once at the head of the authors and thinkers in this department. He proclaimed himself therein as adhering to the *new* school of criminal jurists, called the *Rigorists*, who chiefly lay stress on the conflict of judicial decisions, and leave the judgment entirely to the *dictum* of a criminal code. After some short stay at the Universities of Kiel and Landshut, at which latter place he first received the honourable call to compose the draft of a *criminal code of Bavaria*, he was transferred to Munich, where subsequently he was made a privy councillor in the department of the secretary of state of justice. In 1806, already a thorough re-modelling of criminal procedure in Bavaria had begun, including the tardy abolition of torture, and a new mode of proceeding against criminals denying their guilt; which enactments were drawn out by Feuerbach, and to which we shall hereafter advert. Knowing, as every one does, the immense labour which the conflict of Codes of Law has caused in all times and countries—most of them compiled by commissions and the like numerous bodies of men—it is a fact well worth recording, that it was *one* man who not only made a code of law for his native land, but one which was adopted subsequently by others. Such, however, was the case with Feuerbach, who had the originative faculty possessed by so few. The Criminal Code (Strafgesetzbuch für das Königreich Bayern, Munich, 1813), examined and slightly changed, obtained, on

the 16th of May of the *same year*, the royal *approbation*; and was forthwith introduced into the organisation of the state. Feuerbach's criminal code was afterwards received *in toto* in the dukedom of Oldenburg: and even in the kingdom of Würtemberg, in the grand duchy of Weimar, and other countries, Feuerbach's code was made the basis and groundwork of the criminal law of the land. In 1807 he obtained the royal command to adapt the *Code Napoléon* into a general code of civil law for the Bavarian kingdom, which, although completed by Feuerbach, has not, we believe, yet been introduced or acted on.

With a mind expanded over such vast concerns, Feuerbach could not remain a stranger to anything *progressive*, or bearing on the interests of humanity. Thus, when the people of Germany rose against the sway of Napoleon, our author published his little work, entitled "On German Liberty, and the Representation of German Nations by Parliaments" (*Ueber deutsche Freiheit und Vorstellung deutscher Völker durch Landstände. Leipzig, 8vo.*) But his wishes and claims have remained as yet unheeded by the crowd of German monarchs. The trial by jury, and its diverse and manifold organisation in different countries, also engaged his attention.

In the year 1817 Feuerbach was raised to the chief presidency of the Court of Appeals at Anspach; but being ever anxious for instruction and improvement, he undertook, in 1821, a journey to France, Belgium, and the late French possessions on the Rhine, in order to study the forms of judicial procedure in those countries, the results of which he published in a very comprehensive and practical work, entitled "On the Judicial Constitution and Procedure in France" (*Ueber die Gerichtsverfassung und das gerichtliche Verfahren, Giessen, 1825*). Here he explained the mechanism and organisation of the judicial forms of the Code Napoléon, which, although capable of improvement, are still a splendid monument of the human mind; the more so, if we consider that they were *not* the result of a long *transitory* state of *gradual* improvements, but owing to the legal galaxy of *one* generation of men, one of the last of whom, Royer Collard, has recently departed from us. As Feuerbach never

sought for, nor ever had, riches, the expences of his journey were defrayed by Government. Subsequently he continued to live at Anspach and Munich, devoted to his duties and studies. But nothing ever, which bore on the *public good* of his country, remained foreign to him; and when, in 1822, certain retrograde religious establishments, called Presbyteries, were to be created in Bavaria, he strongly protested against them. His *miscellaneous works* were the last he sent to press, in 1833. Having gone on a journey to Schwalbach, he died in his native city, Frankfort, on the ninth day of the same year, aged fifty-eight.

It will thus be seen that Feuerbach's life was devoted not simply to the practice of the law, but to its improvement as he found it; and no doubt he did greatly improve it: and we have no intention of denying his merit either as a lawyer or as a legislator. But the question which has been raised by this book is not whether Feuerbach was not an eminent and praiseworthy person, or whether his criminal code was not in many respects far better than that which preceded it, as to which no doubt exists, but whether *his* mode of ascertaining the guilt or innocence of a person suspected of a crime is better than that pursued by our English criminal code; and here we think there is very great doubt indeed. We are very glad that torture was abolished in Bavaria in 1806, but still more glad that the Judges of England, as early as the trial of Felton for the murder of the Duke of Buckingham, in 1628, declared that no such proceeding was allowable by the law of England, and that it has been entirely discontinued since the year 1640.¹

But let us examine a little the system of Procedure pursued by the Bavarian Code; there are two features in it which distinguish it from the Criminal Code in England.

First. — It calls on the tribunals to convict on proof short of legal certainty, regulating the severity of the punishment by the approach to full proof; this full proof or legal certainty, not as in England depending on the ultimate impression made on the minds of those who are called

¹ See Jardine's Reading on Torture, 57.

on to judge of the facts, but on the contrary depending on the conformity of the evidence with certain artificial rules of judgment prescribed by the law.

This distinction the Bavarian Code has in common with many other German Codes. The principle in its concrete form, we think objectionable, because we are opposed to any system which fetters the ultimate "finding," or which places it on any other footing than the impression produced on the minds of those who are to pronounce the verdict; but reducing it to its elementary state, and using it to regulate the punishment according to the degree of certainty which the evidence produces on the judicial mind, we think it may well deserve a more careful examination than has been bestowed on the subject in England.

Secondly. — The second feature of the Bavarian Code is new to us in the form which it there takes.

It appears that the confession of the accused being one of the conditions of complete proof, the punishment of death cannot be inflicted until confession is obtained.

To obtain confession the Judges are armed with powers which enable them (perhaps call upon them) to subject the accused to pain far greater than was imposed by judicial torture in its antiquated form. It is, in truth, judicial torture increased in intensity by being applied to the mind instead of the body; or rather to mind and body instead of the body alone.

The prisoner is subjected day after day, and year after year, to never-ending cross-examination, to which, if he refuses to submit, he is coerced by blows. He is imprisoned *au secret*. The charge against him is concealed; one of the objects of questioning him being to obtain it from himself for the purpose of using his knowledge of it against him. Melo-dramatic scenes are prepared in which a witness is suddenly produced; such scenes being garnished with the requisite theatrical "properties" of skulls, bones, or, when the managers are lucky enough to find them, bleeding corpses! Why ghosts should be discarded, we know not. Such miserable jugglery could not be further disgraced by any absurdity however revolting.

Are we not then justified in saying, that all this is only another phasis of judicial torture, worse than the former because of longer endurance? The rude expedients of former times destroyed the body in the process of the torture; this was the difficulty which in the case of Damiens was encountered, but not overcome, by that execrable body of *savans* who, to the disgrace of science and their own immortal infamy, prepared an elaborate report on the best means for ensuring the *maximum* of suffering to their unhappy victim, so applying their torments, that exquisite as they were, they should bring no relief by death, except after the longest possible interval of agony.

The Bavarian artists may congratulate themselves on overcoming the difficulties which baffled the inferior skill of their Parisian brethren. Can it be this victory which has gained all but approbation in this country and from English writers for this part of the Code? Has the great work of Beccaria never crossed the Rhoetian Alps? Are the wise men of Bavaria in a state of comfortable unconsciousness that their proceedings are a horrible begging the question of guilt in the very act of trying the issue of guilt or innocence? Suppose one of these victims, Riembauer for instance, had foreseen his five years of torture, recorded as they are in the forty-two folios¹ of his cross-examination, had implored his judges as a favour to spare him that prolonged agony, to be inflicted as a means of ascertaining his guilt or innocence, and as an act of mercy to convict him at once and without trial, and thus mitigate and end his sufferings, what possible answer, that would not either cover them with infamy, or send them to Bedlam, could they have made?²

English lawyers are accused of being men of practice to the exclusion of theory. No doubt if *action* is pursued to the utter exclusion of *contemplation*, it is pursued too far; yet we could wish those who sigh after legal theories and theorists to remember that in every country in which law-theories

¹ Preface, viii.

² That an innocent person may confess himself guilty, is by no means an imaginary case. See Mem. of Romilly, vol. ii, p. 182., and 3 L. R. 439. 448.

have had their swing, law has always pursued one course, while common sense and common justice have taken another. Nothing but being themselves men of the world, acted upon strongly by the feelings and opinions of their fellow-men, can, we believe, preserve the lawyers of any country from becoming aliens to the views and sympathies of the community at large. * The ultimate consequence of such alienation is always that society rushes into the opposite extreme. Forms are destroyed, and with them the essential distinctions between right and wrong are thrown down. The administration of law becomes short, it is true, but it is a short road to injustice. It becomes the "sword of the oppressor instead of the shield of innocence."

If our readers are inclined to think we are unnecessarily warm in this matter, we beg they may read attentively the present volume, and we will now help their perusal a little. The mode of procedure on the point alluded to is thus shortly noticed in the preface:—

"In Bavaria on the discovery of any crime the *Untersuchungs-Richter* (examining Judge),—and Feuerbach once filled that office which in fact combines the duties of public prosecutor with that of Judge,—instantly sets about collecting evidence. *Those against whom he finds any reasonable ground of suspicion are at once apprehended and kept in prison UNTIL THEIR GUILT OR INNOCENCE BE PROVED.* The Judge meanwhile endeavours to trace back the prisoner's life to his very cradle, to make himself thoroughly acquainted with his character and disposition, *in order thence to infer whether he be or be not a man likely to have committed the crime imputed to him.* To this end witnesses are examined." Preface, p. iv.

Now this may be all very well if the person imprisoned is guilty. But suppose he is innocent. This appears to us to alter the case a little. While the Judge is tracing back the prisoner's life to the cradle, and making himself thoroughly acquainted with his character and disposition, and quietly satisfying himself in his study whether he is on the whole a man likely to have committed the crime, the prisoner is confined within four walls, and plunged in all the

horrors and degradation of a prison. It may be a very curious and interesting inquiry to weigh all the probabilities of guilt and innocence; to trace back the whole history of the career of any given person to whom crime is imputed; it certainly did give Feuerbach "ample opportunity for the exercise of his extraordinary power of penetrating the recesses of the human heart and of divining the secret motives of human action." — Preface, p. iii. The doubt is how far this system can be justified. Let us give the words of the learned Judge himself.

In the preface to the "Documental Exposition of remarkable Crimes," from which this volume is selected, our author states, that they are a review and enlarged work on former editions, which were called "*Merkwürdige Criminalrechtsfälle*," and he states the limits within which he then began his undertaking. Being at that period Privy Referendarius in the *Ministry of Justice*, only such cases came under his cognisance, where either capital punishment had been awarded by the Courts, and had to be decided upon by the Sovereign¹, or where criminals sentenced to minor punishment had petitioned for a commutation. The duty of the author was to bring these cases in such a shape as to be read by the King, which, as a matter of course, precluded any searching detail or extraneous observation. Still, many cases had been *reported* in that shape in former editions of the work. What opportunity Feuerbach had obtained in this respect hereafter, he thus graphically states:—

"Being, for the last ten years, placed at the head of the supreme tribunal of a province, composed of the most distinct elements, counting half a million of people of different creeds and professions, thriving, active, and congregated in considerable towns, — my duty being merely the leading and directing of the judicial power — I have found myself near an untarnished source of remarkable law cases, it being, in fine, optional for me how far and to what points I would direct my attention. Thus

¹ In most parts of Germany, for instance in Austria, things were managed formerly so as to make it appear that it was the *Sovereign* who had pronounced sentence of death. This anomaly has of late been remedied. Still, in Austria, it is the Emperor who has to sign the warrant for every execution.

have passed before me, — omitting the cases of Civil Law, — almost all ideas and positions of criminal jurisprudence, embodied, as it were, in the most diversified and varied cases, — so as to change the halls of Courts into a sort of lecture rooms, where *Nature* herself propounded her doctrines in most remarkable examples, and which I never left without either increasing my stock of private, or at least, human experience. What, beside the judicial part of procedure, most excited my research, or, if you will, my curiosity, was that which lies either entirely without the limits of judicial adjudication, or only slightly approaches them, viz. the nature of incentives, which, at times, of a praiseworthy, nay, noble kind, still, under given circumstances, by the coincidence of more distant or nearer causes, determine man's will to wander towards criminal resolves, — the especial cast of the characters of criminals, before, during, and after the dismal deed; in fine, those germs of criminality, hidden in the innermost folds of the mind; those threads, very delicate and subtle, of which, in many cases, passions, error, or ignorance weave that tissue, which, if man does not evade it in time, or allows his superior faculties to sleep, will soon enchain his will, and then, with *uncontrollable* power, still the consequence of *one crime*, hurl him into the abyss of perdition. The history of crimes, well treated in an historical point of view, is of no slight importance for the elucidation and the practice, nay, the *correctness* and enlargement of jurisprudence; it opens, on the other hand, in the pursuing and picturing of the physiological process of criminal actions, a rich mine of knowledge, both of man and mind, and assists, consequently, that vast department of human endeavours, which has the improvement of their kind for its nearer or remoter object. Even some larger or smaller chapters of the history of states and nations will become more intelligible to him who might have obtained a clue to the character and the motives of many a great action in the annals of criminal Courts. "If a Linnæus," says Schiller, "were to rise for the human species, as we had one for the other kingdoms of nature, who would classify man according to instincts and propensities, how would we be astonished to find some whose crimes, circumscribed within the narrow palings of private life, are now stifled by the grasp of the law, — ranking akin to the monster Borgia." — Preface, pp. ix. and x.

But an Englishman perhaps may be prejudiced enough to doubt whether, — however interesting the process may be, —

we have the right thus to use our fellow-creatures, and on the mere suspicion of guilt to shut them up, and pursue this sort of inquiry respecting them "until their guilt or innocence appear." But is this all? Let us see how the accused person himself is treated by the learned Judge. One miserable wretch, suspected of a double murder, is thus introduced to the bodies of his supposed victims, and with him his mistress, who was thought to be an accomplice.

"Paul Forster was brought in first; he stepped into the room, and between the two corpses, without the slightest change of countenance. When desired to look at them, he gazed steadfastly and coldly upon them, and replied to the question whether he knew the body on the right: 'No, I know it not; it is quite disfigured: I know it not.' And to the second question: 'Do you know this one to the left?' he answered in the same manner, 'No, she has lain in the grave, I know her not.' When asked how he knew that the body had lain in the grave, he replied, pointing to the face, 'Because she is so disfigured; the face is quite decayed here!' On being desired by the Judge to point out the exact spot which he thought so decayed, with a constrained air, but with the coarsest indifference, he grasped the head of the murdered woman, pressed the brow, the broken nose, and the cheeks with his fingers, and said quite coolly, 'Here, you may see it clearly!' He attempted to evade every question addressed to him by the Judge, by affecting that the idea of murder was so utterly foreign to him, that in all innocence and simplicity he mistook the deadly wounds for the result of decay. All the endeavours of the Judge to wring some sign of embarrassment or feeling from this man as he stood between his two victims, were vain: his iron soul was unmoved. Only once, when asked, 'Where, then, is the corn-chandler to whom the house belongs?' he appeared staggered, but only for a moment. The Judge went so far in his zeal *as to desire him to hold the hands of both corpses, and then to say what he felt.* Without a moment's hesitation, Forster grasped the cold hand of Bäumlér in his right, and that of Schütz in his left hand, and answered, — 'He feels cold, — ah! she is cold too;' an answer which clearly contained a sort of contemptuous sneer at the Judge's question. During the whole scene, the tone of his voice was as soft and sanctimonious, and his manner as calm, as his feelings were cold and unmoved. His mistress's behaviour was very different. She was much

shaken on entering the room. When desired to look at the dead bodies, she did so, but instantly turned away shuddering, and asked for water. She declared that she knew nothing of these persons, or of the manner of their death. She said that she had learned, that she was supposed to be implicated in the horrible deed from the populace, who crowded in thousands round the carriage which brought them from Fürth to Nürnberg, calling her a murderess, striking her with their fists and sticks, and ill-using her in every way. But that God would manifest her innocence, and that she could bring witnesses to prove that she had not left her home at Diesbeck for some weeks. Her evident compassion for the victims, and horror of the crime, spoke more in favour of her innocence than her tears and protestations. An alibi was subsequently most clearly proved." pp. 10—12.

It seems, therefore, that the real murderer was perfectly indifferent to the sight of the bodies, and the innocent person was agitated and affected: and surely this is only what was to be expected. A person who would deliberately commit a murder is probably not likely to be moved by the sight of the murdered body; but most other persons would show visible symptoms of horror and uneasiness. This clearly appears from other instances in the same volume. Thus Raushmaier, although clearly guilty, "when the corpse was shown him in the churchyard, was cool and unembarrassed. He showed no emotion, and professed ignorance of the body exposed to view."—p. 286. On the other hand, a poor woodcutter, named Abraham Schmidt, is suddenly arrested on a charge of murder, and shortly afterwards

"Rupprecht's dead body was shown to him, and he was asked whether he recognised it. 'This,' he answered, 'is Mr. Rupprecht. I can swear to you by my conscience and my honour, and to Almighty God by my hope of salvation, that I never injured this man; for I never saw him before in all my life.' 'You say you never saw him before now, how then do you know him?' 'I heard of him from the people here, and in the public-house; besides, I saw him yesterday. My heart and my soul are free from guilt. I never harmed this man. I am in your power, and you may do with me what you will. I am a child of innocence.' *When the accused first entered the room he appeared much oppressed and overcome, but while asserting his innocence his firm-*

ness soon returned. At first the accused did not seem embarrassed, and answered readily, but appeared anxious to avoid entering into details; and on being told that he contradicted himself, *he grew impatient, hesitated, coughed, and stamped*. He did not encounter the searching gaze of the Judge, but looked down, or on one side." —p. 123.

The innocence of the poor Schmidt was afterwards clearly established, and he was discharged. Of what use, then, we may ask, is this offensive proceeding? It seems rather likely to mislead the Judge than otherwise, and is clearly a relic of a barbarous age.¹

But it is obvious that the body, as a whole, must soon moulder away. The Judge, however, evidently looks with a wishful eye upon its remains. If the whole cannot be produced, he renders a part of it available for his purposes. We will make a short extract from Riembauer's case. He was a priest, accused of the murder of a *cidevant* cook and concubine, one Anna Eichstädter, who was "a well-shaped, tall, broad-shouldered woman, remarkable (among other things, which is important in the sequel) *for two rows of most beautiful teeth*."

"As Riembauer could not be moved by admiration, exhortation, argument, or evidence, the Judge attempted to find a way to his conscience through his imagination. The trial had now lasted *two whole years*, when the Judge appointed All Souls' Day in 1815, the eighth anniversary of the murder, for a new examination, *the eighty-eighth in number*. It commenced at 4 P. M., and was intended to convince him, by the overwhelming mass of evidence

¹ It was an old fancy that the murdered body bleeds on the touch or even in the presence of the murderer. It is thus alluded to in Richard the Third. The Lady Anne says to Gloster:—

——— See, see, dead Henry's wounds
Open their congeal'd mouths and bleed afresh:
Blush, blush, thou lump of foul deformity,
For 'tis *thy presence* that exhales this blood
From cold and empty veins where no blood dwells:
Thy deed, inhuman and unnatural,
Provokes this deluge most unnatural.

Act i. sc. 3.

And see various other references to the same purpose in Malone's Shakspeare. Mr. Tollet observes that the opinion is derived from the Northern nations.

collected against him, of the inutility of further denial, and to work upon his feelings more powerfully than usual, by admonition and appeal to his recollections. But he remained unmoved as ever. *At midnight the judge, after addressing the accused in most moving language, suddenly raised a cloth, under which lay a skull upon a black cushion. 'This,' said the judge, 'is the skull of Anna Eichstädter, which you may easily recognise by the beautiful teeth.'*

"Riembauer started from his seat, stared wildly at the judge, then smiled in his usual manner, and stepped aside to avoid looking straight into the empty sockets of the eyes, but quickly recovered himself, and said, pointing to the skull, 'Could this skull speak, it would say, "Riembauer was my friend, not my murderer." He added,—'I am calm, and can breathe freely; but I am pained by being exposed to such scenes, and by the charge brought against me. To-morrow (for Riembauer still asserted that the murder took place on the 3d of November) is the anniversary of the day on which, some years ago, at my return from Pirkwang, I found the whole body lying dead in my room, as now I find this skull. As a citizen, I ever stand in need of the king's mercy, but not as a criminal.' When the report had been read and signed, the judge again led him up to the skull, which he held before his eyes while he exhorted him to confess.

"Riembauer betrayed some emotion, but, with his usual hypocritical smile thus addressed the skull in a solemn tone:—'Oh! if thou couldst but speak, thou wouldst confirm the truth of my assertions.'" p. 100.

Now we could not believe this mummary possible if we had not the best evidence that it was actually performed by a person filling an eminent judicial character. After enduring years of this kind of torture, Riembauer confessed himself guilty. Of what value was the confession—so extorted? But if entirely innocent, would it be unreasonable that under the circumstances here detailed he should not show some emotion at the production of the skull, or one alleged to be so, of a person with whom he had been on terms of the closest intimacy? And this is actually the system of Criminal Procedure which is presented to us for our admiration, if not adoption!

We must now make another remark on this collection of Criminal Trials. We have read it, as in duty bound, but it has indeed been a painful one, and only to be accomplished

at long intervals. Our stomach is not very squeamish in such matters, but a more miserable display of sordid ruffianism we have never seen than is here given. There are many degrees and distinctions in crime, and assuredly a more despicable set of murders than is collected in this volume it has never been our lot to hear of. With one exception, that of Ludwig Steiner, who seems to have been a bold fellow enough, the criminals are all actuated by the most paltry motives. In twelve cases of murder, three were committed chiefly from the desire felt by the murderers to possess themselves of the *clothes* of their victims. The Antonini family, husband and wife, and wife's brother, a boy, conspire to murder a poor girl, one Dorothea Blankenfeld, who was travelling under their escort, and who had never offended any of them. The poor girl was confided to their care; and a little village between Baireuth and Nürnberg was selected for this purpose:—

“Blankenfeld here ordered some *negus*, into which Antonini contrived to pour opium. When she was in bed and fast asleep, the keys were taken from under her pillow, and her trunks opened and examined by Antonini and his wife. They found in them no money, but plenty of fine linen, good men's and women's clothes, and a few jewels. ‘At all events,’ said Antonini, ‘it is worth while to kill her.’ Hereupon they replaced every thing with the utmost care, locked the trunks, and put back the keys under the pillow. This was sufficient for the night. The following day found them at Nürnberg, again debating how they might kill Blankenfeld. The many streams of water which run through the city afforded favourable opportunities for getting rid of the body; but a sentinel, who stood opposite the inn, was an insurmountable obstacle. Carl, who endeavoured to deserve the trust reposed in him, not only by obedience, but occasionally by advice and suggestion, proposed to mix pounded glass in Blankenfeld's soup, and thus to do the deed quietly. But Antonini rejected the scheme as inefficient; he had often swallowed broken glass himself, in sport, with no ill effect. Blaukenfeld thus escaped once more. From Nürnberg they went to the small manufacturing town of Roth, which they reached towards nightfall. The active, watchful Theresa discovered a mattock with three iron prongs in the loft, and showed it to her husband and Carl, with the words:—‘That would give a deadly blow.’ Carl, who was the one selected to do the deed, secretly conveyed

this instrument into the bed-room, and hid it behind the stove. His sister, meanwhile, instructed him how to use it. Another sleeping-draught was administered to Blankenfeld, and nothing more was wanting but to find a place of concealment for the dead body. Carl and Antonini went out separately to reconnoitre: the former discovered a hole in a field, which might do; the latter chose a pool of water in the neighbourhood. But all was again in vain. Accident had brought a number of carriers to the inn, whose eyes and ears might have been awkward witnesses: the murder was therefore again deferred.

"They encountered similar impediments on the two following nights, which they passed at Weissenberg and Donauwörth, on the road between Roth and Maitingen. Time now pressed, for Blankenfeld was to leave them at Augsburg, and they were to pass only one more night on the road before reaching it. Now, then, or never, the plan must be carried into execution. During the last post before Maitingen, Antonini exercised all his ingenuity to ascertain from Blankenfeld whether she had money or valuables concealed elsewhere than in her trunk. He turned the conversation on the Tyrolese insurgents, and the dangers which she might encounter. He said that the Tyrolese had already penetrated into Swabia and Bavaria, where they committed all sorts of cruelties and murders for the sake of the most trifling booty. By these exaggerated statements, he excited the imagination of the unsuspecting girl to such a degree, that at length, losing all prudence in her terror, she put her hand to her breast and said, 'Ah! I will give the Tyrolese all this most willingly, if they will only spare my life!' Had any scruples still lurked in the minds of the Sicilian and his wife, this discovery would have dissipated them. The prospect of a rich booty determined them to run all hazards, and they arrived at Maitingen firmly resolved that their intended victim should die that night. Antonini and his wife had calculated that if so young a lad as Carl committed the murder alone, he would relieve them of the greater part of the guilt, without incurring capital punishment himself. They hoped to secure themselves by throwing the whole blame upon him. They had accordingly drawn him into the plot from the very beginning, and the execution of the murder was now intrusted to him at Maitingen, as it had been before. At this last place they did every thing in their power to inflame his young blood, and to inspire him with courage and determination. The boy, equally docile for good or for evil, blindly followed Antonini's orders, and regarded the murder of an innocent girl as a commonplace event. No feelings of compassion, no pangs

of conscience, seem to have touched him in favour of one who had treated him with uniform kindness during the journey; nor had he any fear of detection or punishment. He only hesitated from fear that his strength was not equal to the undertaking; but his sister promised him all her husband's clothes as a reward for the deed, and Antonini said he would assist him, if necessary, as soon as the first blow had been struck. Carl had discovered in the post-house a large roller, weighing about four pounds, which he thought might serve their purpose, and had concealed it in Antonini's bed-room. He was then sent out to dig a hole in a dung-hill, in which to conceal the body; but in this he did not succeed. Antonini secretly bought some candles, so as to have a light all night, and some brandy. After supper he persuaded her to drink some of the brandy, with which he had mixed laudanum; and at about eight o'clock she went half stupified to bed in her own room, leaving the door open between herself and the Antonini's. Warm water was then procured, under the pretence of a foot-bath, to wash away the blood, and the outer door was locked and bolted. About midnight Carl stole into Blankenfeld's room to see how she lay. She slept heavily, but her position was by no means favourable for their purpose, as her face was turned towards the wall. While the murderers were waiting for her to move into a more convenient posture, it struck Antonini that it would be better to kill the sleeping woman by less violent means than blows on the head, and he proposed to pour melted lead into her ears, or, as Carl suggested, into her eyes. They broke a pewter spoon into small pieces, which they melted in an iron one over the candle. But a drop which fell upon the sheet, and merely scorched it, proved to the murderers that melted pewter cooled too soon for their purpose. This plan was therefore abandoned, and they determined to abide by their original intention. At about four Carl again stole into the room, and found Blankenfeld lying on her back asleep, with her head towards him. 'Now,' said Antonini, 'is the proper moment,' and went up to the bed. Carl followed him with the heavy roller, and when urged to strike the blow he raised the murderous instrument, but hesitated, trembled, and drew back in alarm. Antonini whispered to him some words of reproach, seized his hand which clasped the weapon, gave it a proper direction over their victim's head, and the first blow fell upon the forehead of Blankenfeld, who exclaimed, 'Jesus! my head!' and raised herself in bed. At this moment Antonini seized her by the shoulders, and Theresa by the feet; the unhappy girl now began to cry, and offered her murderers every thing she

possessed, if they would but spare her young life. Pity, fear, and horror seized upon Carl, who hastily flung the weapon upon the floor, and ran to the door to escape. But Antonini's wife rushed after him, dragged him back into the room, and, placing the roller in his hand, ordered him to complete his task. He again stepped up to the bed, and aimed a second blow at Blankenfeld's head, which struck Antonini's forehead at the same time, and Carl again threw down the roller and ran away, while the pain of the blow forced Antonini to let go Blankenfeld, who collected all her strength, jumped out of bed, and rushed towards the door of the outer room. But Antonini fiercely pursued her, and struck blow after blow on her head till she sunk upon the floor, where he still continued to strike her. As she lay on the ground with the death-rattle in her throat, Antonini tore off her clothes and the stays which contained her money. He then lifted the dying woman on his shoulders, intending to carry her out into the yard and bury her in the dung heap. But the weight was too much for him, and Theresa dissuaded him. They, therefore, took her back into her own room. But the wretched woman still breathed, and again began to groan. 'The carrion is coming to life again,' exclaimed Theresa. Antonini then stood upon Blankenfeld's body, and trampled on it with both feet until she was dead. The corpse was then by Theresa's advice thrust into a sack and rolled up in a coverlet. In order to be perfectly secure, Antonini took the further precaution of tying a cord tightly round her neck, while Theresa was busily employed in washing away as much as she could of the bloody stains. She then prepared for the journey by taking off her postilion's dress, and putting on the clothes which Blankenfeld had worn on the previous day." pp. 59—64.

This is painful to read. Further on we have Andrew Bichel, called romantically "the Woman Murderer," but more truly, the "Murderer for Old Clothes," who killed two poor peasant girls confessedly for the sake of their garments, not excepting the interminable and many-folded petticoat. He actually inveigled and destroyed two of these girls under pretence of showing them the fate of their true lovers in a magic glass, and very nearly persuaded many others to come. In 1807 he cast his eyes upon a girl of one and twenty, called Graber. He turned the conversation upon her absent lover, and asked if she had lately heard from him. She answered she had not; he said, "Well, if you will say nothing

about it to any one, you may come to me, and I will then let you look in my magic glass, which will show you whether your lover be alive or dead. But in order to see this you must put on a boddice which is so holy that it can only be touched with a cloth." He added, "that she must bring her best clothes and her finest shift."

She promised to go to him, but did not keep her word, and Bichel sent a woman to her a few days before his arrest to bid her hasten her visit. He also endeavoured by similar representations to induce a certain Juliana Daweck to go to him with her clothes, and repeatedly used the most pressing entreaties to prevail upon her to do so. He laid the same snare for a girl called Margaret Haimberger. These women were saved, some by their want of faith in the wonderful properties of the magic mirror, others by a secret dread of Bichel, and others, again, by mere accident.

The incidents of the murder of poor Catherine Seidel, are thus described by this fiend:—

"On the day of the murder," said he, "I sent for Catherine, and when she arrived I said to her, since we are quite alone I will let you look in my magic mirror. But you must go home and fetch your best clothes, so that you may be able to shift yourself several times. When she had returned in her common working clothes, carrying her other things in her apron, I rolled a white napkin round a board, and brought a spy-glass, both of which I laid upon the table, forbidding her to touch either that or the mirror. I then tied her hands behind her with a bit of pack-thread, — the same which I had before used for Barbara Reisinger, — and bound a handkerchief over her eyes. I then stabbed her in the throat with a knife which I had in readiness. I had a desire to see how she was made inwardly, and for this purpose I took a wedge, which I placed upon her breast bone, and struck it with a cobbler's hammer. I thus opened her breast, and cut through the fleshy parts of her body with a knife. I began to cut her open as soon as ever I stabbed her; and no man, however quickly he may pray, could get through his rosary, or say ten ave maria's, in the time it took me to cut open her breast and the rest of her body. I cut up this person as a butcher does a sheep, chopping the corpse with an axe into portions which would go into the pit, which I had already dug for it on the hill. The whole time I was so eager that I trembled, and could have cut out a bit and eaten it. When Seidel had re-

ceived the first stab she screamed, struggled, and sighed six or seven times. As I cut her open immediately after stabbing her, it is very possible that she may still have been alive when I began cutting. I buried the fragments of the body, after having carefully locked the doors. I washed the bloody shift and gown belonging to Seidel twice, and hid them from my wife, as a cat tries to hide its young, carrying them about from one place to another. I put the other bloody things into the stove, and burnt them. My only reason for murdering Reisinger and Seidel was desire for their clothes. I must confess that I did not want them; but it was exactly as if some one stood at my elbow, saying, 'Do this, and buy corn,' and whispered to me that I should thus get something without risk of discovery." pp. 310—312.

Again, we have the case of George Rauschmaier, whose main inducement for the murder of a poor old laundress, his landlady and fellow lodger, was to possess himself of her clothes. "The thought struck me," he says, "that I would kill Anna Holzman, who, to my knowledge, possessed many good clothes, and who was supposed to have saved some money;" and after her murder, he says, "I then searched her chest for clothes and money, but was much disappointed; instead of what I expected, I found only eight kreutzers."

The case of John Holzinger appears to us rather more interesting, as showing motives of a finer and more peculiar character, and, it is to be noticed, as more illustrative of German manners. Feuerbach describes him as "having a facile temper, which was rendered less estimable by being combined with unmanly cowardice and worse than childish terrors. If roughly addressed, he started in affright. As a child, he ran away when his comrades fought, and he did not dare to walk alone after dark in the fields, much less in a wood."

The circumstances of his first murder are thus detailed:—

"After his wife's death, which took place in June, 1818, her sister Christiana, the divorced wife of a clergyman, a handsome woman of about 30, undertook the direction of his household. The most intimate connection was soon formed between them, and Holzinger seriously intended to marry her. He passionately loved her, and became so accustomed to her society as never to be easy without her. He did nothing without first consulting her, and was

completely under her dominion. According to the testimony of the authorities, her conduct was blameless ; but those who knew her intimately spoke of her capricious and quarrelsome disposition. Whenever Holzinger did any thing to displease her,—if, for instance, he stayed too long at the public-house, or drank too freely, — she reproached him in coarse and violent language. These misunderstandings did not, however, at all disturb the connection subsisting between them, and were always quickly over. Holzinger always gave way to her, and endeavoured to appease her anger by fair words and promises of amendment. One of his common phrases was, ‘Christiana, are you fond of me?’ She generally answered him with a kindly ‘Yes,’ or with an impatient ‘What is the matter now? Why should I not be fond of you?’ He scarcely ever addressed her without pressing her hand, or putting his arm round her neck in an affectionate manner. Although Christiana granted every favour to her lover, she steadily refused to give him her hand in marriage, declaring that she had determined once for all not to marry again. This arose, perhaps, from a desire to indulge her inclinations without restraint ; or, perhaps, her penetration had detected, under Holzinger’s apparent good nature, qualities which made her shrink from a more permanent union with him. Thus constantly refused by his mistress, Holzinger was compelled, by his position as the father of a family, and as a tradesman, to look round for another wife, and when his connection with Christiana had lasted about six months, he selected a certain Johanna R——, of Weissenburg, a woman of forty, who had been twice married, and was then divorced from her second husband. This choice did not, in the slightest degree, interrupt the intimacy subsisting between Holzinger and Christiana. Every thing was done by her advice, and it was agreed that the new marriage should not supersede the old love. Christiana was to stay and manage his household until after the wedding, when she was to return to her own home at Wassertrüdingen, where her lover was to visit her regularly once a fortnight. Holzinger fetched his bride home from Weissenburg a week before the wedding-day, which was fixed for the 3d of January, 1819. It is more easy to imagine than to describe what he must have felt on seeing this woman of forty, or more, contrasted with Christiana who had rejected his suit, and on remembering that the former would remain while the latter would shortly leave him. His passion for Christiana was now mingled with resentment against a woman who could first refuse the hand of a lover, and with perfect indifference see him married to another. The hope of occasionally visiting Christiana was a poor satisfaction ;

he placed little confidence in her conduct when absent from him, and foresaw that another lover would soon share his mistress with him, or, perhaps, entirely supplant him. Indeed, he thought that the favoured lover was already chosen in the person of Carl Schulz, his future wife's nephew, a youth of twenty, who had accompanied his aunt to Ausbach. Christiana frequently talked with him, seemed greatly pleased with his company, and invited him to visit her at Wassertrüdingen. Schulz became the object of violent jealousy to Holzinger, who determined to get him out of Christiana's way. He accordingly endeavoured, by marked incivility, to force him to leave his house, even before the marriage. But, to Holzinger's great annoyance, Schulz stayed, and Christiana's manner towards him remained unaltered. Christiana rendered the evening before the wedding doubly painful to him by harsh behaviour, which, contrasted with the attentions which she paid to young Schulz, increased his agitation, and entirely got the better of his usual patient good humour. Holzinger had been at the tavern from six to eight, when Christiana wrote him an insulting note, in which she called him 'a good-for-nothing drunken fellow,' and desired him to come home immediately. The maid met him on his way thither, and gave him the note in the street. He read, and then tore the letter in the presence of Christiana, who scolded and abused him the while. He endeavoured as usual to appease her by soft words and excuses, and was so much hurt as to shed tears; but, on her continuing to reproach him, he was seized with sudden fury, dashed a stone jug to pieces on the floor, cursed and swore, and tossed his arms wildly in the air. Christiana was ill-natured enough to represent his conduct in the most hateful colours to the bride elect, whom she dissuaded, even at this stage of the affair, from marrying him. Holzinger saw in this a mark of the contempt and dislike with which he believed that Christiana now looked upon him. At six o'clock on the following morning the wedding was celebrated in the presence of Christiana and other relations. After the ceremony they went to Holzinger's house, where they sat round a table drinking arrack, and all appeared to be in the best humour. The misunderstanding of the preceding day seemed entirely forgotten, and Christiana's manner to him betokened complete forgiveness and reconciliation. The forenoon passed without any unusual occurrence. Holzinger appeared cheerful and good humoured, but was observed to drink more than was his habit. Besides two glasses of arrack on returning from church, he drank beer and wine; and, according to the accounts given by his friends, was intoxicated before mid-day. Nevertheless, the quantity he had drunk was by

no means sufficient to deprive him of reason ; he acted and talked like one excited by drink, but was perfectly aware of what he was about, and in full possession of all his faculties. At about one they dined : Holzinger ate nothing but some soup. After dinner, Christiana, who was bidden to a christening, sent for the hair-dresser, and when he arrived she took him by the arm and went into the nursery to have her hair curled. Holzinger, whose jealous suspicions were roused, soon followed them, and, looking through the glass-door, saw the hair-dresser's arm round Christiana's waist. Holzinger burst into the room, gave the hair-dresser a violent box on the ear, and asked him what he was about. Christiana, enraged at his behaviour, abused him, calling him a coarse drunken fellow. He immediately left the room, and went down to the cellar to fetch some wine for the christening. While there he again drank some wine, and then returned to the dining-room, where he found Schulz, and with him Christiana, smartly dressed for the christening. Holzinger went up to her, and putting his arm round her neck, as was his custom, said, 'Come here, I have something to tell you.' But she, who had not yet forgotten the scene with the hair-dresser, pushed him away, and left the room with the words, 'Let me go; you are an ill-conditioned drunkard; I will have nothing more to say to you.' Schulz observed no agitation, or any thing unusual in Holzinger, who left the room soon after. 'A few minutes after Holzinger had gone out of the room,'—these are Schulz's words—'I heard a noise overhead. I thought it might be Holzinger and Christiana, who had made up their quarrel and were romping. But before long, in the midst of the noise, I heard groans. I ran up stairs, and on opening the door I saw Christiana lying on the floor. Holzinger was bending over her, in the act of cutting her throat with a knife he had in one hand, while with the other he held her chin, and the blood spouted up from her like a fountain. As I entered, Holzinger started up, and holding the bloody knife high over his head, exclaimed :—"I am the murderer of this harlot." He then flung the knife upon the ground. I stood a short time aghast at the sight, and then ran down stairs, and out of the house, followed by Holzinger's wife, sister, and maid-servant, who had come into the room in the meantime. Holzinger followed us, brandishing the knife, which he had again seized, and repeatedly exclaiming :—"I am the murderer of this harlot!" Christiana gave no sign of life ; she had ceased from groaning, and her arms had sunk upon the floor." pp. 314—319.

Under these circumstances, he was convicted of manslaughter,

and was sentenced to eight years of imprisonment. He obtains his discharge at the end of six years; but six years' residence among criminals had done more to harden and degrade, than the punishment had done to amend him. His second courtship and second murder are thus described: —

“The trial and imprisonment had utterly ruined him, and he was forced to maintain himself by driving a hired carriage (*Lohn-kutsche*). His wife died during his imprisonment, and he was now at liberty to follow his inclinations. He was scarcely out of prison before he formed a violent attachment to a certain Rosina Ott, a well-conducted girl of five-and-twenty. From love towards the daughter he lodged with the mother, who was a washerwoman, and by unceasing attentions and apparent good humour, he succeeded not only in overcoming her repugnance to a one-eyed murderer, but even in gaining her affections. Rosina Ott was endeared to him by the very labour it had cost him to win her, and he soon gave fatal proof how fierce a passion for her had taken possession of him. Rosina was penniless; a marriage with her was, therefore, out of the question. As Holzinger wanted money, he sought and obtained in marriage a woman of nine-and-thirty, named Margaret Heimstädt, who possessed 600 florins; no inconsiderable sum for a man in his circumstances. He now thought that he had so arranged matters as to gain from a wife what was wanting in the mistress, while the mistress would be to him what the wife could never become. This, however, rested upon the supposition that his wife would allow him to frequent Rosina, and that the mother of the latter would suffer her daughter's connection with the husband of another woman. In both these expectations Holzinger was disappointed. Margaret Heimstädt, who had lived with him as his wife ever since the banns had first been published in church, and had already surrendered the greater part of her property to him, forbade him all further communication with Rosina Ott. On the other hand, Rosina's mother interdicted him from any future intercourse with her daughter. As Holzinger paid no attention to the commands of his betrothed wife or of Rosina's mother, they both went before a magistrate at Ausbach, where they met—though without previous concert,—the latter to claim protection against Holzinger's importunities to her daughter, the former to break off the marriage, and forbid the third publication of the banns. Matters were, however, privately arranged by the mediation of their mutual friends. Holzinger promised his future wife that he would give up all connection with Rosina,

whereupon she consented to retract her declaration with regard to the publication of the banns. The banns were accordingly published for the third and last time, on Sunday, 18th February, 1827, and Holzinger now found himself in the same predicament as on the 3rd January, 1819. On the one hand a middle-aged woman with whom he must live without affection; on the other a far younger woman, whom he passionately loved, and whom he was forced to resign. His bridal day eight years before had been marked by the death of his beloved Christiana, and now the festive Sunday was destined to be celebrated in a like manner. On the evening of the 18th February it was rumoured in the town of Ausbach that Holzinger had killed Rosina Ott by a pistol shot. The aunt of the unfortunate girl, who was an eye-witness of the murder, hastened to inform the police of it. The corpse was found lying in the snow close to a shed in a field just beyond the suburbs; the clothes were still burning in places, and the fragments of a pistol which had been discharged and then broken, and the lock of which was covered with blood and human hair, were found close by. Holzinger had been in the habit of visiting Rosina at her aunt's house after her mother had forbidden him her own. On the 18th February he went to this aunt and told her that his wife suspected his meetings with Rosina, and watched him accordingly, so that he could no longer meet her at the usual place, but that he must have a last interview with his mistress, to whom he wished to present a small farewell gift on taking leave of her. He therefore requested that she would meet him in the evening at a place outside the town. Rosina, on being informed by her aunt of his request, likewise begged to be allowed this last interview, adding that, after this, 'she would have nothing more to say to Holzinger.' Her aunt went with her at half-past five to the appointed place, where they found Holzinger waiting for them. The aunt said that their meeting was quite that of two lovers. He kissed and pressed her in his arms, saying, 'Mine you are, and mine you must be.' On their way home, as they approached the town, Holzinger desired the aunt to leave them, as he wished to give the present which he had brought for Rosina to her alone. At first she refused, and even Rosina did not seem to like the idea of being left alone with Holzinger. At length, however, she gave way, and Holzinger and Rosina walked towards the open fields. The aunt pretended to remain behind, but from distrust of Holzinger she followed the loving couple, and saw them ascend a hillock. She presently heard loud talking, and Rosina's voice exclaiming in a tone of distress. She hurried up the hill, calling out in alarm, Rosina, Rosina!

'Oh, aunt,' answered the girl, 'he is going to shoot me!' at the same moment he fired, and Rosina fell to the ground. The aunt not only saw the flash and heard the report, but distinctly saw Holzinger take aim at Rosina. She screamed aloud at the sight, whereupon Holzinger turned towards her, and called out in a threatening voice, 'If you cry out, I will serve you the same.' This frightened her so much that she ran away. After, as it would seem, completing his deed by shattering the head and face of his mistress with the but end of his pistol, Holzinger went to the village of Schalkhausen, about two miles from Ausbach. He got there at about ten o'clock, and went into a tavern, where he seated himself at a table in a distant and dark corner, saying that he had come from Langenfeld by a very bad road, asked for a quart of beer, which he drank in two or three draughts, then for a glass of brandy, then another quart of beer, and finally for a bed. The host, to whom such a guest was not very welcome, advised him to go on to the town of Ausbach, but he said that he was very tired, had drunk too much, and that the cold was so intense that he was afraid he might be frozen to death if he went any farther so late at night. The host accordingly gave him a room up stairs, to which Holzinger retired, carrying with him a third quart of beer. On the following morning, at nine o'clock, Holzinger had not made his appearance, and the host sent his daughter up stairs to look after him. She returned, saying, that she had peeped through the key-hole, and had seen the stranger standing by the window. At eleven o'clock the host went up stairs himself, and on opening the door he saw to his horror that his guest had hung himself on the iron handles of the upper window, and that he was already dead." pp. 329—333.

We must now close this long notice of this work. It is a bare act of justice to say, that the translation is an excellent one, and the trials have been judiciously curtailed. We should have been glad, however, if the care and talent here displayed had been bestowed on a work more worthy of them. Ladies have done all things well, and we would not discourage them from attempting even law. Hitherto, however, they have not succeeded in this. The celebrated reading of Miss Edgeworth on the Statute of Limitations, contained in her novel of "*Patronage*," has not been adopted by Westminster Hall; and some late attempts to familiarise the readers of the circulating library with the rules as to

circumstantial evidence, have not been more successful. The present work inclines us to warn them from meddling with the Old Bailey.

ART. V. — UNCERTAINTY OF LAW —
CODIFICATION.¹

THE glorious uncertainty of law is too proverbial not to have some truth for its foundation. Without either warranting or questioning the fact, it may not be amiss to inquire, what is the degree of certainty claimed and required in the science of law by its professors; secondly, what part of the administration of the law is most liable to the *opprobrium medicorum* which forms the title of this article, and what are its most appropriate remedies; and thirdly, whether a systematic code, framed by the legislature, or a library of reported cases, is the best insurer of certainty? "There are three manners of certainties. 1. To a common intent. 2. To a certain intent in general. 3. To a certain intent in every particular. The third is rejected in law, for *talis certitudo certitudinem confundit*."² "I remember to have heard the late Mr. Justice Aston treat these distinctions as a jargon of words without meaning. They have, however, long been made, and ought not altogether to be departed from."³ "As mathematical or absolute certainty is seldom to be attained in human affairs, reason and public utility require that the superior number of probabilities should govern the decisions of judges, whether the amount of those probabilities is expressed in words and arguments, or by figures and numbers."⁴ "This court must govern itself by a moral certainty; for it is impossible, in the nature of things, that there should be a mathematical certainty of a good title."⁵ Without any citations, it is abundantly obvious, that Lord

¹ Our own views on the subject of codification have been already brought before our readers. But this does not prevent us inserting the above article, in which some of the difficulties are stated.—ED.

² Long's Case, 5 Co. 121 a. Co. Ln. 303 a.

³ Buller, J. Dovaston v. Payne, 2 H. Black. 530.

⁴ Lord Mansfield in the Douglas cause, Stuart's Letters, p. 134.

⁵ Lord Hardwicke in Lyddal v. Weston, 2 Atk. 20.

Coke's rules, if not the jargon which Mr. Justice Aston unceremoniously denominated them, can be of little or no practical use. The certainty of proof must depend upon the nature of the subject matter: a plot to be picked out of ciphers cannot be proved to demonstration, as a murder committed at noon-day in the public square of a city. To classify the cases in which the first, the second, or the third degree of certainty is to be required, is to exclude evidence, to make the administration of the law more uncertain, by a fruitless attempt to make rules more certain than the things which they regulate. The logic of evidence has been said by a distinguished living writer to be the great desideratum of the present day; but it is not by requiring a given quantity of light that obscurities can be cleared up. The actions and transactions of mankind, *nostri farrago libelli*, are as variable as their forms, their features, or their complexions; and they cannot be subjected to undeviating canons, as the properties of the cube and the triangle. From the strict method and rigid rules of the elder lawyers, it is no wonder that the public expected certainty in their conclusions, and invariable uniformity in the result. But when they found arbitrary rules, adopted by servility, cherished by prejudice, and matured into doctrines which could not, in law, be questioned, but whose absurdity was too plain to be denied—when they found incredibly thin partitions between the case which gave judgment for the plaintiff and the case which awarded it to the defendant, it is nothing extraordinary if they indulged in a sarcasm at the glorious uncertainty of the law, and modern times have done little to blunt its point. Whenever a case is determined upon many minute circumstances, it is morally certain that such a case will never occur again. It is an individual case, and *indivisibilium nulla scientia*. Such cases, as Crambe would say, never have any issue, and are consequently useless members of the commonwealth. Minuteness and multiplicity, as well as inflexible adherence to established rules, lead to uncertainty. *Sisti debet extensio intra casus proximos, alioqui labetur paulatim ad dissimilia, et magis valebunt acumina ingeniorum, quam auctoritates legum.*¹

¹ Bacon de Augm. Sci. VIII. iii. 16.

All the text writers agree, a less degree of probability may be admitted in civil than in criminal cases. As the general spirit of the law of England has always excluded discretion, and reduced every case, as it occurs, to a certain rule (too certain, indeed, for the ever varying circumstances of human actions), the consequence is, that in criminal cases a most unreasonable degree of certainty is demanded. "Such is the spirit of English judicature," observes an intelligent foreigner writing on the subject, "that the court and jury seem to turn their eyes from truth, that they may not see it as it actually is; and it is only when it strikes them in spite of their efforts, that they feel themselves obliged to acknowledge and constrained to proclaim it to the world."¹ But, it may be said, a French jurist has a pardonable leaning to his own system; let us hear, then, "a native and to the manner born." "In England, with national generosity, the prisoners are thrown into the arena, unarmed indeed, but with many avenues of escape open before them. In France, where the law is more lenient, the outlets from the fatal circle are shut, and legal vengeance is only balked when it lies down before innocence, as the lion at the feet of maiden purity."² An experienced criminal judge of the last century has taken the pains to enumerate the chances which a criminal has in this country of escaping without punishment. 1. That the offender is not discovered. 2. That the person injured is not both able and willing to prosecute. 3. That the evidence is not sufficient to enable the grand jury to find the bill. 4. That the indictment is so framed, that the offender cannot be convicted upon it. 5. That the witnesses for the prosecution may die, or be prevailed upon to abscond, or to soften their testimony. 6. That they may be entangled in cross-examination by the prisoner's counsel, and made to contradict themselves or each other. 7. A judge averse to convictions. 8. An ignorant or perverse jury. 9. A recommendation to mercy. 10. An appeal to the public by newspaper paragraphs. 11. An application to the jury to obtain a declaration, that some of them were dissatisfied with the verdict. 12. A motion in

¹ Cottu on the Criminal Law of England, p. 53.

² Foreign Quarterly, iv. 149.

arrest of judgment. 13. A writ of error. 14. An escape. 15. Interest to procure a pardon, and petitions to the Crown in behalf of the convicted criminal.¹

All these chances of escape are still open; modern times may have diminished the facilities of some of them, but have not closed any one altogether. Many examples are to be found in two popular and instructive works, — “The School-master in Newgate,” and “Old Bailey Experience.” The author of those works would add a sixteenth chance, a court of appeal in criminal cases.

It is undoubtedly the interest of every society placed in the same circumstances as the British empire, that nine guilty persons should escape, rather than one innocent perish; but it is more open to controversy, whether the loopholes in the net of justice are not more numerous than that purpose requires. A strong argument for diminishing the number of capital offences was, that the sentence was not inflicted on a fifth part of the convicted criminals; the number of commitments in the United Kingdom, compared with the number of convictions, after making all requisite allowances for carelessness and error, show us strongly the necessity of rendering the criminal code more effective. At any rate criminal law, as it requires the greatest certainty in the pleadings and evidence, has the greatest uncertainty in the result of them.

Next in degree of uncertainty is the event of an ejectment, or any other cause in which the general issue, and nothing else, is pleaded, so that neither of the parties has any notice what is to be proved at the trial by the other; cases better adapted to display the quickness and decision of the successful advocate, than to inspire confidence in the event, or to give certainty to the system.

“An acute observer, who has looked on the transactions of the medical world for half a century, might compose a very curious book on the Fortune of Physicians.”² An experienced practitioner, who has witnessed the vicissitudes of Westminster Hall for the same period, might write as curious and instructive a work on the uniformity of verdicts. An eminent philosopher, more conversant with the calculation of

¹ Hawkin's *Life of Johnson*, p. 522.

² *Johnson's Lives*. Akenside.

chances upon mathematical principles, than with the practice of trials of fact, has computed that, granting a moderate probability that each of twelve jurors would decide rightly, the chances of the rectitude of their unanimous verdict would be five thousand to one. In practice, it is well known that the obstinacy and strong constitution of a dissentient jurymen has very great force in modifying the decisions of the rest. As the verdict is unanimous, not from choice, but by the strongest compulsion, it very often wears the appearance of a compromise between contradictory opinions. It is hardly a proper subject for statistics, but it is not too much to say, that two verdicts out of every twenty are not such as a single, sound, and dispassionate judgment would acquiesce in; and if a fewer number are in practice set aside, it is only because in the circumstances a new trial would be useless or dangerous. In criminal law, with which jurymen are in general most thoroughly versed, we find such verdicts as these, — “Guilty of perjury, but not wilful or corrupt.”¹ “Guilty erroneously, but not intentionally.”² “Guilty of forgery without an intention to defraud.”³ “Guilty of uttering forged notes without knowing them to be forged.”⁴ So a covenant reasonable, but not usual, that rent should cease until buildings destroyed by fire or accident were rebuilt, was declared by a verdict of landlords to be an unusual and unheard-of covenant, and was therefore held to be neither usual nor reasonable.⁵ These instances are given, not to depreciate one of our most time-honoured institutions, trial by jury, but to elucidate one of the sources of uncertainty in law. What human wisdom could have foreseen any one of those verdicts? And this deserves the more notice, as the influence of the Bench and the Bar upon the minds of the jurors has been for some time upon the decline. The term, “a perverse verdict,” is only to be found in the books within the last five-and-twenty years, perhaps from a want of power “dicendo tenere hominum cœtus, mentes allicere, voluntates impellere quo velit, unde autem velit, deducere.”⁶

¹ State Trials, vol. xix. 669.

² Ibid. xx. 625.

³ Brecon Circ. 1827.

⁴ State Trials, vol. xx. 910.

⁵ Medwin v. Saudham, 1 T. R. 735.; 3 Swinb. 85.

⁶ Cic. de Orat. i. 8.

The aid to be given by the legislature in insuring a greater degree of certainty in the administration of justice, consists in removing all defects and impediments not necessarily inherent in the framework of the constitution. Thus, in the catalogue of chances before mentioned, the humanity of the judge, and the perversity of the jury, are defects necessarily incident to human nature; and, in criminal cases, a verdict so obtained is, and perhaps ought to be, irreversible; but the indisposition or inability of the person injured to prosecute might be remedied by employing a public prosecutor in every case certified by a board of magistrates in each county. So the tendency of the law of evidence has hitherto been rather to exclude falsehood than to elicit truth, but the numberless exclusions on account of infamy and interest —

“ Huge windows which exclude the light,
Long passages which lead to nothing — ”

have been abolished by the legislature.¹

To spin the thread of their verbosity finer than the staple of their argument, to make minute and fine distinctions, divisions and subdivisions, which smell more of the lamp than of the healthy and wholesome converse with the fields of human action, is not more characteristic of English lawyers than other jurists where law has been for ages a separate study, though it may have been laid to their charge. *Leges Angliæ plenæ sunt tricarum, ambiguitatumque, et sibi ipsis contrariæ. Fuerunt etenim excogitatæ atque sancitæ à Normannis, quibus nulla gens magis litigiosa atque in controversiis machinandis et proferendis fallacior reperiri potest.*² The Normans are noted in their own country for a shrewd and litigious temper, which may have given a character to our courts of justice in early times. Something too of that excessive subtlety and that preference of technical to rational principles, which runs through our system, may be imputed to the scholastic philosophy, which was in vogue during the same period, and is marked by the same features. No tribunals of a civilised people ever borrowed so little, even of

¹ St. 6 & 7 Vict. c. 85.

² Philip. Honor. cited in Barr. Stat. 51.

illustration, from the writings of philosophers, or from the institutions of other countries.¹ Lord Bacon, adopting the language of Scripture, calls the schoolmen *cumini sectores*; but in the law of his own day, and still more in that of the present, may be found subtleties, of which Aquinas and Erigena never dreamed. They do not appear so to us, because their consequences are vital and real; but in an exploded science or a dead language, they would appear as puerile as scholastic reasonings. "How pure the laws of England would be were it not for these subtleties!"² exclaims Lord Erskine investigating some invisible difference. Sir William Grant used to observe,— "The principal difficulty I find in the law of England is to distinguish between the rule and the exceptions." Numerous exceptions, founded on minute differences, make all rules comparatively valueless. Without attempting to investigate the differences between the law of England and that of other countries,—differences so great that any conclusion must be *in alio genere*, without speculating upon the causes which have contributed to produce this effect, the highly artificial nature of the law itself may be reckoned one of the great sources of uncertainty in its application.

This introduces the question, whether reducing the body of the law to its first principles by a code, would produce greater certainty in its administration. All experience is on one side, all theory on the other, and it is difficult to find a judgment perfectly unbiassed by the inferences of the one, or the conceptions of the other. By experience is not meant the history of the Continental codes, as the circumstances and habits of the nations for which they were framed, and the materials of which they were composed, differ so widely from our own, as hardly to afford analogical argument, but the results of codification, as far as it has gone, in this country. The statute law itself only acquires certainty in the eyes of practising lawyers, when every branch of it is hedged round by decisions, which leave no room for doubt. *Quemvis mediâ erue turbâ*, select any one from Westminster Hall, counsel or client, plaintiff or defendant, and ask whether he

¹ Hallam, Middle Ages, ii. 468.

² Thellusson Case, cited Sugd. Powers, 13 Ves. 223.

would prefer going into Court with a case in point, or a declaration of the law in his favour. Unquestionably, unless all our forensic habits are to be altered, he would prefer the former. But, without trying the question by this criterion, let us examine the mode of fabricating each system, and its texture or wear.

The revision of the law of England ought to be intrusted to a board of competent commissioners, not appointed by parliamentary or private interest, devoting their whole time, and bestowing their zealous and undivided energies in perfecting so great a work. They have to avoid all inquiries of a speculative and fanciful nature, which are apt even in this country to divert the attention of persons so employed, and found their report upon experience alone. They have to abrogate the obsolete, to declare the doubtful, to supply omissions, to correct defects, and to furnish a framework suited to the habits of the age in which we live, and the daily growing exigencies of a society rapidly advancing in population and civilisation. They have to execute the great work without haste or negligence, with a due recollection of the past and foresight of the future, with a due respect for the claims of usage on the one side, and improvement and uniformity on the other. It is, after a due interval for observation and objection, given to the world, introduced into parliament, and passed through the two Houses without injudicious alterations, and it becomes the law of the land. It must necessarily consist of general propositions, with the usual exceptions and limitations. Can it possibly approach the definiteness and precision of a case in point? In simplicity, in method, in uniformity, we might be gainers; but in certainty we should be considerable losers.

In the counterpart we find a multitude of reported decisions, each professedly resting upon some principle of law or equity, in cases occurring in actual practice, with the full benefit of arguments upon both sides, not upon speculative points, or hypothetical questions, but upon propositions involving immediate loss or benefit to each party. Then the decision is pronounced with a full sense of the responsibility of the judge, and a perfect consciousness that, if erroneous, it may be reversed on appeal. The practical value of such

materials, compared with the provisions of the best-considered code, is boundless ; the difference between the two is like that between truth and fiction, or the judicial and deliberative oratory of the ancients compared with the epideiktic or demonstrative. If it be urged that a decision can scarcely be found in which the judge, without any impeachment of his soundness or integrity, might not have come to the opposite conclusion, the same observation may be made of the same points, ordained by legislation. A chain of reasoning equally solid and coherent might have conducted the legislator or judge to the opposite conclusion to that to which he arrives. But the difference is, that if any flaw can be perceived in judicial reasoning, the cause is carried to another tribunal in legislation, the erroneous position remains until repealed, though the reasoning upon which it is built is faulty. The provisions of a Code might, and probably would, be composed of the same materials ; but neither in the selection, nor in the wording, would they go through the same assay. Anomalous, careless, and unprincipled decisions are certainly to be found in the books, and the sooner they are expunged the better. If judges and reporters would do their duty, they would never have appeared there.

Next, it is to be considered, which tissue stands wear and tear best. If the reader is inclined to concede the position before laid down, that the statute law only acquires certainty, when every branch of it is hedged round by decision, there will be no question as to the superior certainty of judge-made law. If not, let him consider how much explanation, amendment, and supplement, the best-framed acts of the legislature now require ; and conclude, what would be the consequences of putting all the law of England into the statute-book. Let him recollect the difficulty with which the alteration of the law of wills was brought to the knowledge of the people ; and how seldom, even now, its provisions are literally complied with. The common law of the land, the customary law of villages and hamlets, is, from its superior antiquity, its traditionary nature, and its exemption, till lately, from change, better known in ninety-nine cases out of a hundred to those who live under it, than the labours of the legislature. Whenever it is superseded, it will be suc-

ceeded by that *vagum jus et incognitum*, which is uncertainty itself. By way of illustration, not of argument, the Continental codes may be adverted to. Prussia is a country in which the government does every thing, and individuals comparatively nothing. On the other hand, "the gathered wisdom of a thousand years," as the reports may be termed, are the creation of individuals, and made almost entirely at their expense; the government has done little in their formation or production. It is superfluous to say, that in Prussia there was no body of decisions which had grown with the growth and strengthened with the strength of the nation, and adapted itself to the increasing intelligence and wants of the people; all that the Commissioners had to deal with were feudal tenures, and peasant and burgher rights. The land-recht of Prussia was promulgated in 1794, and has been seven times revised, and even now stands in need of much alteration, to suit the people for whom it was framed. The criminal Code of Bavaria was recast and composed in nine years, promulgated in 1813; and in three years, one hundred and eleven articles, a majority of the whole, were repealed.¹

The five French codes were extracted from the immense body of customary law existing in different parts of the kingdom before the revolution, by the most enlightened lawyers of the time, thoroughly conversant in the practice of the old law, no deep civilians, and therefore no bigotted advocates of the code, and, above all, fully impressed with the necessity of alterations and improvements, required by the new state of society in which they lived. They had the aid of the great man whose name the code bears, whose profound and perhaps unrivalled knowledge of human nature, and perfect familiarity with the habits of all ranks in his dominions, would have enabled him, with his decisiveness of intellect and perspicacity of consequences, to improvise a code for himself. The result of their united labours is a clear, concise, methodical body of the rules of law on every subject, delivered with the precision and discrimination eminently characteristic of the French language. Yet the code forms a very minute item in a French advocate's library, and when its literal interpretation is in his favour, he feels that his cause is only half won.

¹ Savigny, Zeitschrift, iii. 13. But see *antè*, p. 54, 55.

Within ten years after the publication of the French code, fifty volumes of reports appeared, to explain its provisions, and in thirty years from the time of the French revolution, more than a hundred volumes of statute law were published.¹ We have the opinion of a competent judge, whose partialities, if any, were in favour of continental jurisprudence:—"The five codes of law, compiled under the eye of Bonaparte, though in some respects justly objectionable, will always be honourable to his memory. He himself thought so favourably of them, as to express to a friend of the Reminiscent a wish that he might descend to posterity with these in his hands."² "The Code Civile possesses great merit; the Code de Commerce is very faulty; and whatever is good in any of the five codes, is rendered almost entirely useless by the Code de Procédure, which has completely confounded and paralysed all the judicature of the country."³

It is difficult to ascertain the comparative certainty of two completely different systems of jurisprudence; but the French law, by its adherence to general rules, and never descending into particulars, loses much of the circumstantiality and practical value of the English. In the review of *Le Code de Napoleon*, in Sir Walter Scott's *Life of Bonaparte*, which was written by Mr. Wright, of Lincoln's Inn, at the request of the illustrious author, and to which we have been indebted in this article, it is observed, that the fifth and sixth titles of the First Book of the Code Civile contain one hundred and sixty-seven propositions upon the subject of marriage, by which the rights arising in different circumstances from that contract, the most important in civilised society, are to be determined. If from these rules are deducted those which contain no principle, but merely regulate the forms of proceeding, the amount will be greatly diminished. The English law on the same subject, to say nothing of legislative enactments, contains no less than a thousand reported cases, as may be seen by a reference to Roper's *Treatise* and Chitty's *Index*, each of which affords ground to rule any other case in similar

¹ Kent's Commentaries, vol. i. 468, n.

² Butler's Reminiscences, vol. i. 49.; *Memoirs of the English Catholics*, vol. III. p. xix.

³ Co. Ln. 191 a. Butl. n. III. 2.

circumstances. In this view, the certainty of the law of England, compared with that of France, bears the proportion of ten to one. If the practical nature of its propositions are taken into consideration, the superiority will be still more evident.

No code can provide for all specific cases, or be so constructed as to exclude future exposition. Justinian's prohibited any interpretation but his own.¹ So did the king of Bavaria, by ordinance, dated October 19th, 1813. In the imperial institutes, as well as in the codes of France, Bavaria, Austria, and Prussia, some authority is designated, from which exposition in doubtful cases is to be had. With these glosses and explanations, the simplicity of the code attains the circumstantiality of case and precedent, and in the same proportion as it does so, becomes more certain, and better fitted for the transactions of an artificial state of society.

ART. VI.—PRACTICAL USE OF THE ROMAN LAW.

A Compendium of Modern Civil Law. By FERDINAND MACKELDEY, Professor of Law in the University of Bonn. Edited by Philip Ignatius Kaufmann, from the 12th German edition in 2 vols. Vol. I. 8vo. London, 1845.

AT a very early stage in our labours², we remarked on the gross inconsistency existing in a country like England, where the importance to the public of having well-educated lawyers is greater, and the provision for legal education less, than in any other part of Europe. Since we wrote this the Benchers of one Inn of Court, much to their honour, have founded Lectures on Jurisprudence and the Roman Law—topics on which the profession at large has long felt an especial need of instruction. We heartily wish the plan success; and in aid of the views of the learned benchers, we hasten to bring to their notice a work, which has just been published contemporaneously in the United States and in this metropolis.

Germany has of late years produced many admirable introductions to the study of the Roman Law, but none superior in simplicity, perspicuity, and practical utility, to the com-

¹ Dig. Pref. s. 21.

² No. I. Art. XI.

pendium of the late Professor MACKELDEY, of Bonn, which appeared first in 1814, and soon became so popular as to run through twelve editions in the succeeding twenty years; each edition being carefully corrected by the Professor himself, down to the very last year of his valuable life. Mr. Kaufmann, who is a German by birth, but practises as a lawyer at New York, has thrown open this treasure "to the wide-spread nations that use the English tongue;" and, allowing for a few native idioms, he has ably performed his task as a translator. But it is as an editor, that he aspires to, and deserves, much higher praise; for he has judiciously (though slightly) corrected the text; he has revised and reduced to greater uniformity the author's notes, incorporating with them many passages from the Roman Jurists; and he has added very valuable notes of his own, explaining, and in some instances controverting, Professor Mackeldey's doctrines.

The title of the work is an unfortunate one. The expression "modern Civil Law" conveys to the mind of the mere English reader no distinct meaning—certainly not the meaning of the author, who intends by the word *Civil*, the *Roman Law*, in so far as it relates to the civil concerns of life; and by the word *modern*, restricts his subject still further to those principles, which are applicable to modern times; excluding all such institutions (for instance domestic slavery) as are alien to the present legislation of Europe. In an introduction of 119 pages, the author, after premising some general definitions of law and legal science, sketches a short history of the Roman Law; notices the collections of it made at different periods of time; describes the various methods which have been used in teaching it; and enumerates the principal publications which constitute its literature. Proceeding then to the body of the work, he first lays down, in what is called the "General Part," those fundamental principles of legal science, which recur in every separate portion of the law; and then begins the "Special Part," with an application of the same principles to "real rights," or, as we say, "the rights of things." Such are the contents of the first volume (the only one yet published), and we must say that the ability displayed in it, both by the author and edi-

tor, makes us look with some eagerness for the completion of the work.

The practical English lawyer of the present day will no doubt readily grant, that all this may afford to the philosophic cultivator of Jurisprudence a most interesting field of research. But he will perhaps say, "Of what use will such a study be to *me*? How can it bear on *my* professional pursuits?" Why, if you are content to do nothing, through life, but copy precedents, and tread the dull routine of ordinary business, to be sure it has nothing to do with you, nor you with it. But as there are few so totally without a sense of what is honourable and dignified in their profession, so there are few to whom a knowledge of the principles of law, as developed and applied, in the Roman system, to the varied concerns and interests of civilised life, will not be found as useful in practice, as the system itself is clear and comprehensive in theory. The objection, however, shall presently receive a more specific answer; but, first, let us call to mind the period which connects the legal history of ancient Rome (as sketched by us in a former number¹) with that of modern Europe. The compilation of Roman Law, which we call the *Corpus Juris*, was begun by order of Justinian, A. D. 530; but in the preceding century the Northern hordes had already broken down the barriers to which the foresight of Augustus had limited the Roman Empire. That vast monarchy had fallen asunder; and the Western and Eastern emperors were forced separately to struggle with the invaders, for their respective domains. Franks, Goths, Vandals, and Huns had overrun the fairest provinces. The Eternal City itself had more than once been laid waste; and the Eastern emperor alone retained his throne at Constantinople. The warriors destined.

To east the kingdoms old
Into another mould,

were men of a far different stamp from those whom they had subjected. The former were heathens, grossly ignorant of arts and letters, but brave, hardy, and resolved on conquest; the latter were Christians, possessing all the literature, science, and refinement of the age; but timid, effeminate,

¹ No. V. Art. VII.

and prone to submission. Accordingly the barbarians subdued whole kingdoms; but as "captive Greece" had formerly "captivated her rude conqueror," so now the wild sons of the North gradually yielded to the influence, first of the Roman clergy, and afterwards of the Roman lawyers, and at length exchanged their loose traditionary laws for written legislation.

This transition is ably described by M. GUIZOT. "In fixing themselves to a permanent abode," (says he) "and becoming landed proprietors, the barbarians contracted, both with the Roman population and with each other, relations more various and durable than any which they had previously known. Their civil existence assumed a greater breadth and stability. The *Roman Law* alone was fit to regulate this new existence. That law alone could deal adequately with such a multitude of relations. The barbarians, however they might strive to preserve their own customs, were caught, as it were, in the net of this scientific legislation, and were obliged to bring the new social order, in a great measure, into subjection to it, not indeed politically, but yet civilly."

So great a change cannot be supposed to have been wrought at once, or by the same gradations, in every community. Some compilations of law were impregnated with the dominant barbarism, others with the Roman civilisation; whilst in several countries two legal systems, of different origin, stood side by side, and individuals lived under the one or the other, at their own choice. To the ruder class of laws belonged the *Lex Salica*, the *Lex Ripuariorum*, and others of a like character: among the more refined may be distinguished the *Breviarium* of Alaric, King of the Visigoths, which long continued to be followed in Spain. Gundebald, King of Burgundy, appears to have framed two Codes for the two classes of his subjects, one entitled *Lex Burgundionum*, the other, *Lex Romana Burgundionum*, which latter was ably edited in 1826, with a learned comment, by Dr. Barkow of Gripswald. Montesquieu, in his 28th book, has assigned various causes for the gradual disuse of all these codes; he has fallen, however, into the common error of supposing that the Theodosian Code, which preceded that of Justinian nearly 100 years, was the only work, by which Roman juris-

prudence was known in the Western Empire, till the 11th or 12th century. The fact is, that the Justinianean *Corpus Juris* continued to be the law of the Eastern Empire till A. D. 890, when it was superseded by the *Basilicals*: but this was not all; for after Italy had been twice re-conquered by the valour of Belisarius and Narses, Justinian introduced his body of laws into that country, where they continued to be more or less observed, long after the authority, from which they emanated had passed away. The once prevalent notion, that the Justinianean Collection was wholly lost, until the discovery of the Digest at Amalfi, has been clearly disproved. Doubtless, amidst the ignorance and political convulsions of the dark ages, Jurisprudence was little studied, on any system whatever; but the zealous and persevering researches of SAVIGNY have not only detected numberless passages, in the public and private documents of that time, evincing an acquaintance with the different portions of the *Corpus Juris*, but have illustrated some whole works founded on it, such as "*Petri Exceptiones*" (Savigny, v. 2. App. A.) and the "*Brachylogus*," of which latter the best edition is that of 1829, by Professor Böcking.

Toward the close of the eleventh century, a fortunate concurrence of circumstances rendered Bologna the seat of a learned University, or *Studium*, as it was then called. Among the teachers was one PEPO, who lectured on the Roman law, but he was far excelled by his scholar IRNERIUS, of whom mention is first made in 1113. The latter was the founder of a school of Commentators, who explained every part of the *Corpus Juris* by *Glosses*, a mode of instruction which soon became extremely popular, and spread the study of the Roman law through all the civilised parts of the Continent. Nor was it only regarded as an object of science; but, by the tacit recognition of most princes and people, it was received as a COMMON LAW, by which the local laws were construed and their omissions supplied. DR. ARTHUR DUCK, a learned civilian of our own country, in his work "*De Usu et Autoritate Juris Civilis Romanorum per Dominia Principum Christianorum*," (A. D. 1678) has shown, in great detail, how this degree of authority came to be conceded to

the Roman system, in the German empire, in part of France, the Italian principalities, the Two Sicilies, Spain, Portugal, Poland, Hungary, Bohemia, Sweden, and Denmark. Such was the state of things on the Continent, till the Revolutions, which broke out within living memory made way, in most of those countries, for fundamental changes in their jurisprudence. But it would be a gross mistake to suppose that the new codes of the present age are unconnected with the Roman law. Far from it. On this point we cannot cite a more competent witness than M. PORTALIS, the minister charged with the explanation of the Napoleon Code. “Ce ne sera pas connaître nos Codes (says he) que de les étudier seulement eux-mêmes; il faut, pour comprendre le Droit Français remonter au *Droit Romain*. Le législateur Français a rassemblé un certain nombre de principes, et leur a donné force de loi; mais c’est dans le *Droit Romain*, que se trouve le développement de ces principes.” (Exposé des motifs du Code Civil.) And elsewhere, “Les philosophes et les Jurisconsultes de Rome sont encore les instituteurs du genre humain. C’est, en partie, avec les riches matériaux, qu’ils nous ont transmis, que nous avons élevé l’édifice de notre législation nationale.” (Disc. à l’Acad. de Législ.)

So much for Continental Jurisprudence. How stands the case with the laws of our own country? And, first, we would remind our readers, that the Roman law is, in a great measure, the common law of *Scotland*; for though the land-tenures and services there are mostly of feudal origin, and there are some ancient customs peculiar to the country, yet where these, or subsequent statutes or precedents, do not intervene, the judges commonly decide by the rules of the Roman law, from which also the judicial procedure and legal formularies were originally taken. For this reason, not only have Professorships of the Roman law been, from very ancient times, established in the Scottish Universities, and Courses of Lectures to this day regularly delivered; but no man can be admitted to practise, either as an Advocate or Writer to the Signet, without undergoing an examination in that law; and the appeal papers to the House of Lords attest the accurate acquaintance with it, which all Scottish lawyers of any eminence possess.

In *England*, no doubt, the case is different; yet even here, we do not hesitate to assert, that some acquaintance with a jurisprudence, which may be truly deemed European, will be found, if not indispensably necessary, yet certainly useful, in no small degree, to the legislator, the diplomatist, and the lawyer. The pursuits of the *Legislator* bear the same relation to the Roman law, as those of the literary man do to the Roman language. The Latin is a key to the Italian, French, Spanish, and Portuguese languages. Why? Because the latter are, in great part, derived from it. Just so must there necessarily be a resemblance between the laws of those countries; because, as we have seen, they are, in great part, *derived* from the *Corpus Juris*. Our parliamentary committees have often evinced their sense of the value of *Comparative Jurisprudence*. They have sought to illustrate various departments of legislation by examining the laws of other countries on similar subjects. But those laws, when brought together and compared, have been found to bear, as it were, a family likeness to each other —

Facies non omnibus una,
Nec diversa tamen, qualem decet esse Sororum.

How is this to be accounted for? Simply because they *are* of the same family; because the fair jurisprudence of the Antonines is, to this day, reflected, in its lineal descendant, a French, an Austrian, or a Sicilian Code.

And what are we to say of the *Diplomatist*? We certainly neither expect, nor wish him to be a mere jurispudent. Doubtless, he ought to be a man of the world, fit to deal with a shrewd and wary antagonist, and well acquainted with the national interests of his day, their intricate combinations and sudden changes. But he, too, will find, on examination, that the Roman Law has furnished principles on which the modern nations of Europe have built up their international Code, and to which we ourselves appeal, even in our controversies with the states of the Western hemisphere. What is the Oregon question, in principle, but a case under the Roman Law “*Finium regundorum* ;” or the Interdict, “*Uti possidetis*,” according to the different lights in which it may be viewed?

The *Lawyer's* sphere is of wide extent. In the first place,

he, as well as the Diplomatist, may be engaged in *International* questions, which touch on points of Roman Law. We remember the great case of the *Danish Loans* in 1810; where the argument, as to the King of Denmark's property in the sums advanced to the merchants, turned on the Roman *Jus Fisci*. To appreciate that argument, a knowledge of the Roman Law was manifestly necessary; and among the judges (it was in the Court of Prize Appeals) were Sir William Grant and Lord Stowell, both deeply versed in that branch of legal science. The same eminent persons used to sit on *Colonial Appeals* from Lower Canada, St. Lucie, Trinidad, Demerara, the Cape of Good Hope, and Ceylon, and might have sate on appeals from Malta, but none were prosecuted. How necessary, in such cases, a knowledge of the Roman Law was (and still is) both to the Advocates and Judges, may easily be learnt from Mr. Burge's valuable work on Colonial Law.

In *Scotch Appeals* to the House of Lords, the same necessity may exist. It is true, that in these the English Lawyer has generally the benefit of a Scotch colleague; but we should suppose that no man, with a just sense of professional dignity, would willingly feel himself, at a consultation, or a hearing, wholly dependent on the skill of his associate, for the means of doing justice to a client, whom he had personally undertaken to support.

Ecclesiastical Appeals to the Judicial Committee of the Privy Council (as heretofore to the suppressed Court of Delegates) may happen to turn on principles of the Roman Law; and in these appeals gentlemen of the Common Law may be engaged with Civilians. Of this kind was the case of *Henshaw v. Atkinson*, in the Delegates (A. D. 1816), which was argued (amongst others) by the present Lord Chancellor. That the main point was of great nicety, may well be conceived, when we mention, that before the decision of a majority of judges could be obtained, it was heard by six, who were divided *three* and *three*; then (under a commission of adjuncts) by eight, who were divided *four* and *four*; then by fourteen, who were divided *seven* and *seven*! (I Lec. 239.) A very eminent civilian, the late Dr. Swabey, contended, four times successively, for the application of the Roman rule: "*qui se scribit*

heredem," &c. (Afric. D. 48. 10. 6.); and though the decision was ultimately against him (under a fresh commission) by a majority of *ten to five*; yet, without a knowledge of the principles of the law in question, and of their agreement or disagreement with the Law of England, it would have been impossible to resist with effect the learned Doctor's argument.

Again, common lawyers may be employed, jointly with civilians, in *Admiralty Appeals*, as well from the Instance as the Prize Court, both of which tribunals have derived from the Roman Law much of their procedure, and many of their principles of decision. Now the Admiralty Reports attest, not only that Lord Stowell, the great oracle of that forum, relied, in many arduous cases, on the authority of Bynkershoek, a well known master of Roman jurisprudence, but that the noble judge himself was deeply versed in the same science; nor can we doubt that in this, as well as other respects, his mantle has fallen on his present able and learned successor. To impugn, or to defend judgments founded on a principle of the Roman Law (for instance, on the *Lex Rhodia de jactu*, Dig. 14. 2. 1., or on the distinction between *derelictum* and *deperditum*, Dig. 41. 2. 21.), it is evidently desirable (not to say indispensable) that the advocate should partake, in some degree, of the learning of the judge. We remember an able argument of the late Master Stephen, to exonerate a joint prize agent for responsibility for proceeds, which had only come to the hands of his co-agent. But the lords of prize appeal held, that both agents were equally liable, on the principle, that "*si plures, ejusdem bonorum curatores facti sunt, in quem eorum vult actor, in solidum, ei datur actio.*" (Celsus, D. 42. 7. 3.) So in another case, where the same learned counsel contended that the effect of an unexpired licence granted in March, 1809, was narrowed by a general order of the Secretary of State, issued in the May following, the Lords held, that the licence was a stipulation with the party, and was therefore to be construed and applied as at the time of its date; on the principle, that "*in stipulationibus, id tempus spectatur, quo contrahimus.*" (Paulus, D. 50. 17. 144.)

Hitherto we have touched on matters which, it may be said, fall but casually within the scope of a barrister's or so-

licitor's occupations. Let us see, then, whether the proper and ordinary studies of these gentlemen may not derive some light from Roman jurisprudence. The able historian of the English law has expressed an earnest wish that its obligations to that of Rome might be fully displayed.¹ The space at our disposal will not allow us to attempt so wide a task; but we may briefly touch on the most prominent topics of the suggested inquiry. We may note some marks of Roman parentage in the scientific arrangement of our legal system, in the very substance of our law, and in the technical language which it employs. We may show that comprehensive heads of judicature have been framed on Roman plans; that the ermined sages of the bench have sometimes been guided in their judgments by the wisdom of Roman jurists; and that on other occasions they have felt doubts, which might have been resolved by consulting the same oracles; and, lastly, we may at least throw it out for consideration, whether the *Corpus Juris* may not yet furnish some suggestions for the improvement of our own legislation.

First, then, as to the *scientific arrangement* of our legal system—who led the way in this undertaking? Glanvill, Bracton, and the author of Fleta. The opening page of Glanvill is a literal transcript from Justinian's Institutes, and we have lying before us old editions of Bracton and Fleta, in the margins of which are numerous manuscript references to parallel passages in the same Roman work. That the Code and Digest were equally familiar to these writers and their contemporary, Thornton, has been shown by Selden, a common lawyer, who in a very learned age obtained the distinctive appellation of "the learned Selden." (Ad Flet. c. 3. s. 4.) The earliest elementary arrangement of the Roman law now extant, is that of Gaius (circ. A. D. 170.), whose fundamental division is into *persons, things, and actions*, i. e. legal remedies. (Gai. Inst. i. 8.) This division was adopted in the Institutes of Justinian, and has generally served as a basis to subsequent elementary treatises of law. There is a remarkable circumstance with regard to Fleta, which we have not seen noticed. In his proœmium, the Author promises

¹ Reeves, H. E. L. i. 82. n.

to treat first, of the charter of liberties and the statutes, secondly, of personal actions, and, thirdly, of real actions; but from some unknown cause, the work, as now extant, is confined to the second and third branches announced. In the reign of James I., Professor COWELL drew up *Institutes of the English law*, following Justinian, book by book, and title by title. In 1734 WOOD's *Institute of the Laws of England* pursued the Roman method less servilely, but still kept it in view. Blackstone himself, though far more original, still made the old division of Gaius the basis of his arrangement, for his first volume answers to Gaius's first book; his second to Gaius's second and third; and great part of his third and fourth to Gaius's fourth.

So much for the arrangement of the law. Turn we now to the *substance*. And, first, speaking generally, the marginal references alone to Blackstone's Commentaries suffice to prove that the points in which our law is taken from the Roman are almost innumerable. It would be well, however, that the law student should pay more attention to those references than is commonly done. Many readers do not notice them at all. Others are not aware that "Ff. 28. 2. 11." signifies "Digest, book the twenty-eighth, title the second, fragment the eleventh," or that in most editions, *Inst.* in italics, signifies the Institutes of Justinian, and "Inst." in Roman type, the very different Institutes of my Lord Coke; whilst many of the best informed and most careful students think it quite sufficient to turn to the passage cited, without troubling themselves to enquire whether it contains an opinion of Labeo, Ulpian, or Tribonian (that is, whether it dates from the first, third, or sixth century), or whether it is in harmony with, or in opposition to any previous or subsequent law.

If we inquire more particularly into the substance of the *common law*, we learn from Blackstone that it is nothing else but a "collection of Maxims and Customs." (Com. i. 67.) And my Lord Hale opines, that "its original is as undiscoverable as the sources of the Nile." (H. C. L. 55.) We will begin then with the *Maxims*, for if we can trace any of these to their source, we shall have done something towards

effecting that discovery, of which the excellent Chief Justice despaired. Here again the learned Selden comes to our aid. He observes, that Bracton, Thornton, and the author of *Fleta* often cite the Roman laws, the latter simply as law, the two former with designation of book and title, "more jurisconsultorum Cæsareorum." (Act. Flet. 3. 1). He says, that the very words of the Roman law were at that time, and long afterwards, not only cited with like specification in the common law courts, but sometimes taken as rules of decision, of which he gives what he calls "*egregium exemplum*," in a case of the year 1318, when a doubt on the construction of the statute of Marlborough was resolved by a rule of the Digest, L. 4. t. 5. fr. 11. (Ib. viii. 3.) He adds, that about the reign of Edward III., this usage was discontinued; after which the Roman law maxims were occasionally cited indeed, and in *Latin*, yet "*non ut ex jure Cæsareo petitas, sed velut in Anglicano natas*." (Ib. viii. 5.) My Lord Coke's Institutes and Reports contain abundant evidence of this species of legal plagiarism. Thus, it is laid down (as if it were an original maxim of the English law), that "*Conventio privatorum non potest publico juri derogare*." (1 Co. Inst. 166.) But this is from PAPINIAN. (D. 2 14. 38.) Again,—"Optima interpret legum consuetudo." (2 Co. Inst. 18.) But this is from CALLISTRATUS. (D. i. 3. 37.) So,—"Minimè mutanda sunt, quæ interpretationem certam semper habuerunt" (2 Co. Rep. 74.); from PAULUS (D. i. 3. 23.) So, "*maris et feminae conjunctio (quam nos matrimonium appellamus) est de jure naturæ*" (7 Co. Rep. xiii. 6.);—from ULPIAN' (D. i. 1. 1. s. 3.)—So,—"Ad ea, quæ frequentius accidunt, jura adaptantur" (7 Co. Rep. 28.);—from POMPONIUS (D. i. 3. 3).—In short, a careful research would show, that all (or nearly all) those maxims of the Common Law, which are not restricted to feudal institutions, originated in the sound sense of the old Roman jurists, who united with a penetrating intellect a Spartan brevity of expression.

The Common Law *Customs*, general and particular, were doubtless of very various origin; some, perhaps, derived through the Canon Law, from the Roman; others British, Saxon, Danish, or Norman. On these we shall not dwell,

but pass on to the *Termes de la Ley*, as our old writers call them. These were mostly Norman-French, and though often distorted in their application, they betrayed in general a Roman origin. Take, for instance, the word "*Mortgage*." This (however strange the metamorphosis may appear,) is certainly derived from the Latin *Vas*, which Festus defines "Sponsor datus in re capitali;" and accordingly Cicero applies it to Damon, when bound for his friend Pythias, "*Vas factus est alter, ut si ille non revertisset, moriendum esset ipei.*" (Offic. 3, 39.). It is curious to note the transformations which this old Roman word has undergone in different languages, as the Latin *Vadis*, *vador*, *vadatus*, *vadatio*, *vadimonium*, — the barbarous Latin, *Vadium*, *vadia*, *vadiare*, *disvadiare*, *invadiare*, *revadiare*; *Wadius*, *wadia*, *wadiare*, *revadiare*; *Guadius*, *guadium*, *guadia*, *guadiare*, *reguadiare*; *gadium*, *gadiare*, *gadiator*, *gadiarius*; *gagium*, *gagiare*, *gageria*, *disgagiare*, *contragagiammentum* — the Italian *gaggio*, *ingaggiare*, *ingaggiato* — the French *gage*, *gages*, *gageure*, *engager*, *degager* — the German *wagen*, to deposit a stake — the Scotch *wadset*, a mortgage — the Anglo-Saxon *wad*, a surety — the English *wed*, *wedding*, *wage*, *wager*, *wages*, *gage*, *engage*, *engagement*, *disengage*, &c. Now as a man, who became *Vas*, for another, was a living pledge, *vivum vadium*; so land hypothecated for a debt became a dead pledge, *mortuum vadium*, *gaggio morto*, *mort-gage*, and the last mentioned term passed from the Norman-French to the English, in its present acceptation.

Again, take the phrase "*Assignment of Dower*,"—"Assignetur ei Dos sua," says the Great Charter of King John. (A. D. 1215.) "Assignetur ei," (says the Charter of King Henry III., A. D. 1217,) "pro Dote suâ, tercia pars totius terre mariti sui, que sua fuit in vita sua, nisi de minori dotata fuerit ad ostium Ecclesie." (Blackst. Gr. Chart. pp. 13. 40.) Though there was no proceeding strictly analogous to this in the Roman Law, yet from that law both the terms *assignetur* and *dos* are borrowed. "*Adsignare*" meant originally to sign or subscribe an instrument, (Scaevola, D. 26, 18, 20,) and as signed instruments were often used in allotting or transferring a thing, or right, the act itself of allotment or transfer came to be called *assignatio*. Thus a father might

adsignare libertum, allot to one of his sons the right of patronage over a freedman. This was done at first by a signed instrument, but subsequently it might be effected by a word, or a mere gesture. (Ulpian, D. 38. 4. 1.) In such allotments, though the *adsignator* was the father, the *adsignatus* was not (like our assignee) the person to whom the assignment was made; but the freedman, the subject of transfer.

To trace the word *dos* through its successive changes, *dotis*, *dotalis*, *dotalitium*, *dotarium*, *doarium*, *doaire*, *dower*, would require a long etymological discussion. Suffice it to say, that though the monks, who drew up the Great Charters in Latin, employed the word *dos* for *dower*, they meant by it something very different from what it signified in pure juridical latinity. The *dos* of the Roman Law came not from the husband originally, but from the wife or her friends. It is defined, "id quod ab uxore vel alio, ejus nomine, pro sustinendis oneribus matrimonii, datur, promittiturve." (Brisson ad voc.) Hence it was called the "Wife's Patrimony" (Ulpian, D. 11. 7. 16.); and though left under the husband's administration during the coverture, it generally reverted to the wife, or her friends, when the marriage was dissolved by death, or otherwise: to provide for which contingency, the *dos* might be secured by the *cautio rei uxoriæ*, which was in use so early as A. C. 227. (A. Gell. 43.) The Roman *dos*, in fact, answered nearly to what we call "the wife's fortune," when settled to her use. But the dower (miscalled *dos*) of the English law was a mere provision for widowhood. It is defined, in Fleta, "id quod liber Homo dat Sponsæ suæ, ad ostium Ecclesiæ, propter onus matrimonii, et nuptias futuras, ad sustentationem uxoris, et ad liberorum educationem, si vir præmoriatur." (Flet. 5. 23. 2.) And when there was no "*dos ad ostium Ecclesiæ*," the law (as we have seen) gave a third part of the husband's lands, which in Fleta is called *dos rationabilis*. (Flet. 5. 23. 11.) Blackstone inclines to think that the introduction of dower into our law is not to be ascribed to the Normans, and that it formed no part even of the feudal law, until "first of all introduced into that system by the emperor Frederick the Second" (Comm. 2. 129.); that is, between

1215 and 1250. Now the feudal law grew out of the customs of the northern nations, and varied in its details, as those customs varied. Tacitus remarks it as a usage of the Germans, (contrary to the Roman practice,) that "*dotem non uxor Marito, sed uxor Maritus offert.*" (Mor. Germ. s. 18.) And Olaus Magnus says, "*apud Gothos non mulier viro, sed vir mulieri dotem assignat.*" (Goth. Hist. 7. 9.) Among the gifts usually made by the German husbands, Tacitus mentions "*frænatum equum,*" and it is remarkable, that in addition to a proportion of the husband's property, the laws of the Visigoths required him to give a certain number of *horses*. As to the proportion of his property, *that* differed widely. By the *Lex Visigothorum* (3. 1. 5.) it was a tenth, by the *Lex Longobardorum* (2. 4. 1.) a fourth, and by the *Constitutiones Siculæ*, (3. 14. 1.) a third: and as this last law was enacted by Roger the *Norman*, A. D. 1130—1154,) it was probably common at that time to the Normans of France and England. One fact is certain, that before the date of Frederick's law, (which could not well be earlier than 1220,) the Queen dowager of England applied to Pope Innocent III., who died A. D. 1216, to compel a nobleman, who had seized the castle of Segrey in Touraine, to give it up as part of the *dotalitium* assigned to her by the deceased king. To this the holder of the castle replied, that such a claim was only cognizable by the feudal lord. (Decr. 2. 2. 15.) Coupling this circumstance with the language of the charters of 1215 and 1217, which evidently treat dower as an established usage, there can be little doubt, but that it formed part of the Anglo-Norman system, long before the time of Frederick the Second. The gloss, on the decretal just quoted confounds dower with the Roman *donatio propter nuptias*; but *that* was entirely voluntary, and restricted neither by law nor custom to any definite portion of the marital property. (Justin. i. 2., 7. 3.) On the other hand, Bracton applies to the English dower the maxim "*ubi nullum matrimonium ibi nulla dos,*" (Brac. 2., 39. 4.), which originally related to the Roman *dos*, i. e. the wife's fortune, "*Ubicunque Matrimonii nomen nonest, nec dos est.*" (Ulpian. D. 23, 3. 3.)

And are there no comprehensive *Heads of Law* administered by our courts which the Roman law may claim as its own? What are the *Trusts*, which afford so wide a field for the Chancellor's jurisdiction? "They answer (says Blackstone) to the *Fideicommissa* of the Civil Law." (Comm. 2., 327.) And again, "this notion (of a Trust) was *transplanted* into England, from the Civil Law, about the close of the reign of Edward III." (Ib. 328.) "Transplanted" is an expressive word: it implies, that a large mass of doctrines had taken root, as it were, in the Roman soil, and had been thence removed, whole and entire, into British ground. It is worth while, then, to ask, what the Roman Law of *Fideicommissa* was. It was no trivial incident in the legislation of the country; but grew up gradually, until it embraced a large body of interests of various kinds. At first it was applied only to Inheritances and Legacies; for "when Testators were desirous" (says Tribonian) "of giving an inheritance or legacy to persons, to whom (for certain legal reasons) they could not directly bequeath it, they *trusted* to the *honour* of some one legally capable of taking the bequest, and enjoined him to transmit it to the person intended to be benefited. The things so left were said to be *Fidei commissa* (trusted to honour) because they were originally secured, not by any bond of law, but by the mere sense of honour in the Trustee. In the course of time, however, many complaints were made of the breach of this confidence, and the Emperor Augustus, either from personal regard for the complaints, or because he learnt, that his own name had been used in vain as a solemn injunction to Trustees; or perhaps from having himself observed some flagrant instances of perfidy, in violating the requests of Testators, at length ordered the Consuls to enforce such Trusts by their magisterial authority. As this was manifestly just, the measure became popular, and gradually assumed the shape of a regular jurisdiction, which a judicial officer was finally appointed to exercise, under the title of *Fidei-commissarial Prætor*." (I. 2., 23. 1.) When testamentary Trusts had thus been established by law, the transition was easy to Trusts created by acts *inter vivos*, and these were eventually recognised as obligatory by a rescript of the Emperor Antoninus Pius. (Scævola, D. 32., 1., 37.)

Fideicommissa, in their various relations, occupy a large space in the Digest. Gaius, Pomponius, Mæcianus, Valens, Ulpian, and Paulus, all wrote distinct treatises on them; and the doctrines of these writers, as well as of Julianus, Scævola, and Papinian, will generally be found applicable to Trusts, in our Courts of Equity.

Bankruptcy presents another wide field of equitable jurisdiction; and the appointment of assignees is a main feature of our bankrupt laws. Now, this is plainly taken from the prætorian law; for the Prætor might put several creditors in possession of their debtor's goods, and they might commit to one of their number the task of selling the property and distributing the proceeds: and if they could not agree in the nomination, the Prætor, taking summary cognizance of the matter, might himself appoint to the like office a *Magister* (i. e. an Assignee). (Gaius, Comm. 3. 79. Ulpian, D. 42., 5, 8.)

Composition with Creditors was also provided for by the prætorian law. If all the creditors assented, the agreement was binding: if one or more dissented, the Prætor might exercise his discretion, in sanctioning, or otherwise, the terms of composition. (Ulpian, D. 2., 14, 7.)

Our *Insolvency* Laws, as is well known, are founded on the Roman *cessio bonorum*, the origin of which is attributed by some to one of the *leges Julæ*, in the time of Augustus; though there is reason to believe it was of still earlier date; for Varro (L. Lat. 6, 5.) ascribes a similar law to C. Popilius, in the dictatorship of Sylla (A. C. 81). These laws were subsequently much improved (Justin. c. 7., 71, 8.), and similar laws have been adopted in many countries, though not always on the most rational principles. The great error has generally lain in stigmatising alike the honest and dishonest insolvent; and this has sometimes led to the most absurd consequences. For instance, about the sixteenth century, a law was passed, in the Pontifical States, requiring all insolvents, who availed themselves of the *cessio bonorum*, to wear a *green* cap: and by another law all Jews were to wear a *yellow* cap. It happened that a Jew became insolvent, and ceded his goods, and it was long disputed what coloured cap he should wear; till, at length, the knotty point was resolved

by decreeing that he should wear a cap *half yellow and half green* ! And this is gravely reported, with the arguments at length, by Constantinus, ad Statuta Urbis, (Annot. 50., sec. 132.) without the slightest reference to the Jew's honesty or dishonesty.

Letters of Licence granted by creditors to their debtor for a determinate period are recognised by our courts (Ves. 14. 185.), and are derived from the *Induciæ quinquennales* of the Roman Law. (Justin. c. 7. 71. 8.) It would seem, too, that a like indulgence was sometimes allowed (perhaps where the creditors unreasonably refused) by an imperial rescript. (Gr. Val. and The. c. 1. 19. 8.)

Among other points, on which the Roman Law has come under careful consideration in the Court of Chancery, that of the effect of *Domicil* on the succession to personalty readily brings to mind the memorable case of *Somerville v. Somerville*, (5 Ves. 750.) in which some of the ablest lawyers of the time were engaged, Mitford, Grant, Romilly, Piggot, Mansfield, Adam, Richards, Mackintosh. Their researches embraced the opinions of Alfenus, Labeo, Ulpian, and Paulus, and the rescripts of Hadrian and Diocletian; nor did they omit to avail themselves of the labours of modern commentators, Huber, Voet, and Bynkershoek. It is obvious, that in a like discussion, counsel, who are well grounded in the Roman Law, must possess a great advantage over their less learned opponents.

From the Prætorian Interdicts, our *Chancery Injunctions* derive their origin. Nor is this all: from the same source have flowed various *Common Law Writs*; for instance, that *de ventre inspiciendo*, which is noticed by Bracton, and though rare, is still in use (re Blakemore, coram Bruce, V. C. 8 May, 1845). The interdict from which this is taken is very fully set forth by Ulpian, (D. 25. 4. 1.) and is remarkable for its caution in offending as little as possible the delicacy of the female inspected. Another remarkable circumstance is, that though the general rule was that "*quod attinet ad jus civile Servi pro nullis habentur.*" (Ulpian, D. 50. 17. 32.); yet in this particular case, a slave might obtain the Interdict; and the reason is worthy of note — "*Publicè enim interest, partus non subjeci; ut ordinum dignitas familia-*

rumque salva sit." (Ulpian, D. 25. 4. 1. s. 13.) It is probable, therefore, that this interdict was one of the means devised by Augustus to secure the dignity of ranks and families, an object to which much of his legislation was directed. At all events, the interdict existed in the time of Trajan, for it was commented on by Aristo, whom Pliny addressed as "*peritissimus et privati juris et publici*," (Epist. 8. 14. A.D. 103.); and the Digest contains not only his opinion, but those of Julianus, Scævola, Paulus, and Ulpian, many of which might be found applicable to cases arising in our courts on the writ.

Individuals, who know nothing of the Roman legal system but the maxim "*quod principi placuit Legis habet vigorem*," will be surprised to learn, that to another part of the same system we are indebted for that great protection of our personal liberty, the writ of *Habeas Corpus ad subjiciendum*. "This writ," as Mr. Hallam says, "has always been (in England) a matter of right," (Const. Hist. i. 317.); at least we find it early noticed in the Year Books. The general principle, "*nullus liber homo capiatur nisi per legem*," was recognised in the charter of Runnymede; but the writ, which secured its prompt and immediate effect, was doubtless an afterthought; and, by whomsoever devised, it was nothing more than a copy of the Interdict *de libero homine exhibendo*, which was framed by the Prætor "*tuendæ libertatis causâ*," (Ulpian, D. 43. 29. 1.), and was commented on by Trebatius, the protégé of Cicero (Venul. D. 43. 29. 4.); indeed it probably existed earlier, for the *Lex Fabia* (A.C. 183.) had imposed penalties on false imprisonment. The interdict, however, without prejudice to the action under that law, afforded a cumulative and more expeditious remedy. (Ulpian, D. 43. 29. 3.) It will be observed that the *liber homo* alone was protected, either by the Runnymede Barons, or by the Roman Prætor; for where villenage or slavery exists, the free man is but the more sensible of the force of the Roman maxim "*Libertas inæstimabilis res est*." (Paulus, D. 50. 17. 106.)

That still surer safeguard of all our civil rights, *trial by jury*, was not indeed directly handed down to us from the Romans, but passed through various gradations, from a

Norman or Saxon source. Still the early Roman Law furnishes a procedure strikingly analogous, as Filangieri has shown, to the English jury trial. In the time of the republic, the power and duty of the *judices* was confined, as that of our jurors has always been, to the question of fact alone. “I giudici (says Filangieri) non facevano altro ch’ esaminare la verità del *Fatto*” — “la cognizione del *Dritto* era per essi inutile.” (Sci. Legisl. l. iii. c. 16.) Hence it was necessary that the questions of law, and those of fact, should be accurately distinguished; the importance of which circumstance we have considered in a former number; and, indeed, it must be obvious to any one, who reflects on our Common Law Maxim, that “matter in law shall not be put in issue to be tried by the country.” (Co. Rep. 11. 10. b.) Thus it was held to be matter of fact (and must therefore have been determined at Rome by the *judices*) what was the *amount* of a party’s interest (Paulus, D. 50. 17. 24.); whether a gift was *intended* to be absolute or conditional (Julian, D. 39. 5. 1.); at what *time* the condition was actually performed (Ulpian, D. 1. 5. 16.); and the like. But whether the interest claimed by a party was a *legal* one; whether a gift could *legally* take effect according to the donor’s intention; or whether the performance of a condition imposed could at any time produce the intended *legal* result — these were questions of *law*, with which the *judices* had nothing to do.

It may perhaps be thought remarkable, that the *Challenge of jurors* should find a type in the Roman Law. Yet such was the effect of a *Plebiscitum* (circ. A. C. 59.) which Cicero terms “*Lex æqua*” (In Vatin. 11.); and of which his commentator, Asconius, gives this account — “*Legem quidem non improbabilem videbatur P. Vatinius, in tribunatu suo, perrogasse, ut alternorum judicum rejectio fieret.*” (Comment. fragm.)

Lastly, the *compulsory unanimity* of our juries, which has been deemed so singular a feature in their practice, is not altogether without analogy in the Roman procedure; at least in one particular case. “*Duobus petentibus hominem in servitutem, pro parte dimidiâ separatim, si uno judicio liber, altero servus, judicatus est, commodissimum est, eò usque cogi judices, donec consentiant.*” (Julian, D. 40. 12. 30.)

We turn to a different topic — that of cases in which English judges and counsel have doubted on points perfectly clear in the Roman Law. In the well known case of *Pasley v. Freeman* (3 T.R. 51.), (A. D. 1789), it was held by Lord Kenyon, Ashurst, and Buller, against Grose, that a false affirmation made by (A) that (B) is a person of credit, if made *with intent to defraud* (C), and causing him damage, gives (C) an action on the case, in the nature of a writ of deceit, against (A); and in the case of *Hayward v. Creasy*, 2 East, 92. (A. D. 1801.), it was held by Grose, Lawrence, and Le Blanc, against Kenyon, that where such a false affirmation is made by (A) believing it to be true, and *without intent to mislead* (C), it does not give (C) such an action. Surely it is matter of regret, that one of our highest tribunals should exhibit to the world so great a dissonance of principle; for first, it is held by a single Judge (Grose) that the action will not lie, even where the intention is fraudulent; secondly, by several Judges, that it will lie, if there be a fraudulent intention, but not otherwise; and thirdly, by a single Judge (Kenyon), that it will lie, even though the intention be honest. Now the middle opinion, which is incorporated into the present law of England, was established, on ample authority, many ages ago, as the law of Rome. “Pomponius refert, Cæcidianum, Præ-torem non dedisse de Dolo actionem adversus eum, qui adfirmaverat idoneum esse eum, cui mutua pecunia dabatur; quod verum est; nam nisi ex magnâ et evidente calliditate, non debet de Dolo actio dari.” (Ulpian, D. 4. 3. 7.) And again, “Consilii non fraudulentum nulla obligatio est; cæterum si Dolus et Calliditas intercessit, de Dolo actio competit.” (Ulpian, D. 50. 17. 47.) So that we have Cæcidianus, Pomponius, and Ulpian agreeing, and their doctrine recognised by Tribonian (400 years after it was first broached), and no opposition made to it (so far as is known) by any ancient or modern; and yet (as Mr. Evans, with just surprise, observes) “though the subject underwent very considerable discussion (in the two cases above mentioned), the direct authority of the Roman Law was not once adverted to, either by the bar or the bench.” (Evans, Poth. 1. 296. n.)

Among recent cases, to which a like remark seems applicable, we may notice *Franklin v. Neate*.¹ This was an ac-

¹ Supra, Vol. II. p. 493.

tion of trover, for a chronometer, which one Gilbert had pawned to Neate, as security for 15*l.* and interest, with liberty to the latter, if the article were not redeemed within twelve months, to sell it, and pay himself out of the proceeds. Franklin bought the chronometer of Gilbert, while it was in Neate's hands, after the expiration of the year. He then tendered to Neate the amount due, and on his refusal, brought the action. Trover, of course, will not lie, unless the plaintiff has a *right of property* in the goods; and therefore, at the trial, it was argued for the defendant, that the sale to Franklin merely assigned to him a *right of action*, with an equity of redemption. On this view of the case, the learned Judge directed the jury to find a verdict for the defendant, giving leave, however, to the plaintiff to move that the verdict should be entered for him, for 19*l.* 10*s.* The case was accordingly argued before the full court, and judgment was delivered by Rolfe B., who said, "There is *very little to be found in the books*, on the subject of the right of a pawnor over the chattel pawned; but this is very clear, that notwithstanding the pawn, the pawnor still retains a *qualified property*: and in the *absence of direct authority* on the point, this seems to us decisive in favour of his right to sell, and by the sale to transfer to the purchaser his qualified property in the goods pawned, together with all the rights incident thereto." Accordingly the rule was made absolute in favour of the plaintiff. Now, on this we would, with great respect, observe, that though little is to be found, on the right in question, in the Common Law Books, there is abundance in the books of the Roman law. The fundamental principle was, "*Pignus in bonis debitoris permanere.*" (Dioel. et Max. c. 4., 24. 9.) That is, that the pawnor continued to be the proprietor, (*Dominus*) of the thing pawned. He had in it the *jus dominii*, not a *qualified*, but an *absolute* right of *property*; whereas the pawnee had a different right, the *jus pignoris*, which was indeed a right of *possession*; but still he possessed it *pro alieno*, that is, as the property of another. (Paulus, D. 41., 1. 48). Therefore he was bound, first, to exercise exact diligence in the keeping of it, (Justin, I. 3. 15. 4.), but if it perished by accident, then, on the principle that *res perit Domino*, the loss fell on the pawnor. (Ulpian,

D. 20., 1. 21.) Secondly, The pawnee was to keep an account of the produce (if any) of the thing, and if such produce equalled the debt, he was to restore the thing, or if it exceeded the debt, he was answerable for the surplus, in an *actio pigneratitia*. (Sev. et Ant. c. 4., 24. 1.) Thirdly, He was to restore, if the debt was satisfied, or *tendered*, either by the pawnor, or by another creditor. (Marcian, D. 20., 5, 5.) Fourthly, Not only had he no right of property in the thing, when first pledged, but he could not acquire such right by long possession, (called in the Roman law *Usucapio*.) (Paulus, D. 41., 1. 48.) Fifthly, he could not even use the thing for his own purposes, without exposing himself to an *actio furti*. (Gaius, D. 47., 2. 54.) Sixthly, By the old law, he could not sell it, except *ex pactione*, by virtue of a special covenant; and by the later law, he could only sell it otherwise, under judicial authority. (Justin. c. 8., 34. 3.) Whilst, on the other hand, (and here we come to the very point of *Franklin v. Neate*,) the pawnor might at any time, (whilst the *Jus pignoris* existed) sell, and thereby transfer the *dominium* of the thing to any creditor, under the general rule of Papinian, “*Creditorem a debitore pignus emere posse; quia in dominio manet debitoris*. (D. 20., 5, 12.)

Far be it from us to contend, that our supreme courts should hold the rules of the Roman law to be binding, in opposition to any established doctrines of the Common Law! But where those doctrines are deficient, or obscure, or questionable, it is surely worth while to consult a legal system, which has stood the test of so many ages, and is so highly venerated throughout the rest of Europe. In this view, the Roman law seems to have been considered by the Lord Chief Justice of the Common Pleas, in *Acton v. Blundell*¹; where the plaintiff was owner of a Well, and the defendant of a Mine in his own ground, nearly half a mile distant, the deepening of which, for the purpose of mining operations, drained away the water of the well. For this damage, an action on the case was brought; at the trial of which, the learned Judge directed the Jury, that the inconvenience suffered by the plaintiff was *damnum absque injuriâ*, and the verdict was accordingly for the defendant. Hereupon the plaintiff's counsel tendered a Bill of Exceptions, and the mat-

¹ *Supra*, Vol. I. p. 226.

ter was argued, 2d Dec. 1842, in the Exchequer Chamber, before six Judges, who took time to deliberate, till the 17th May, 1843. Hence it would seem, that the plaintiff's counsel, and probably some of the Judges, regarded the question as novel, and rather difficult; and yet a rule directly in point was laid down by Marcellus, in the second century of our era, and has probably been followed ever since on the Continent. "Marcellus scribit, cum eo, qui, in suo fodiens, vicini fontem avertit, nihil posse agi, nec de dolo actionem." To which Ulpian adds, "et sanè non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit." (D. 39., 3, 1. s. 12.) And in a like case, Trebatius says:—"neque enim existimari, operis mei vitio damnum tibi dari, in eâ re, in quâ *jure meo* usus sum." (D. 39., 2. 24., s. 12.) Lord Chief Justice Tindal, therefore, in delivering the judgment of the Court, adverted to the authority of Marcellus, as *corroborating* the other considerations in favour of the verdict. The well in question had been sunk within twenty years; and his Lordship left it in doubt, whether the action might not have lain, in the case of an *ancient* well; but neither Marcellus, Ulpian, Trebatius, nor any other Roman jurist, countenances such a distinction.

That our laws are capable of amendment, is a proposition which may be considered as rather axiomatic; and if so, it is no very bold demand on credulity to assume, that some hints, at least, toward their improvement, may be collected from the labours of Jurists, whom Portalis calls "*Les Instituteurs du Genre Humain*;" and to whom alone, as D'Aguesseau says, "*Jurisprudence has unveiled all her mysteries.*" Did our limits permit, we might easily form a long list of points, both civil and criminal, on which the Roman law would generally be thought more consonant than our own to natural justice; but we must content ourselves with taking a few at random.

1. Much as we are disposed to uphold the sanctity of marriage, yet when it is considered that the unmarried *Mother* may have been more sinned against than sinning; that to her offspring she may have discharged the most sacred duties of a parent, and bound them to her by the tenderest ties of mutual affection; it may well deserve consideration, whether

the provisions of the Tertullian and Orphitian *Senatusconsulta* should not be admitted into our law — “*Licet vulgo quæsitus sit filius, filiave, potest tamen ad bona ejus Mater, ex Tertulliano senatusconsulto, admitti.*” (Justin. I. 3., 3. 7.) And again, “*sciendum est, etiam illos Liberos, qui vulgò quæsitæ sunt, ad Matris hereditatem, ex (Orphitiano) senatusconsulto, admitti.*” (Ib. 3., 4. 3.)

2. How cruel are the cases of *Adoption*, which, in fact, (though not in law,) occur frequently in England! A wealthy couple, perhaps, having no progeny of their own, adopt a child of humble parentage; that is to say, they separate it for ever from its natural connections; they bring it up in idleness and luxury; they totally unfit it for earning its bread by labour, and fill its mind with shadowy expectations of wealth; and after all this, they throw it off capriciously in their lifetime, or die without making any provision for its support. The law of this country neither invests the child with any right, nor subjects the adopting party to any obligation, much less to any penalty for the abandonment. But what says the Roman law? “*Assimilatur is, qui adoptatus est, ei qui ex legitimo matrimonio natus est.*” (Just. I. 1., 11. 8.) “*Adoptivi liberi heredes instituendi vel ex hæredandi sunt, secundum ea quæ de naturalibus exposuimus.*” (Ib. 2., 13. 4.) And this example is followed in (we believe) all the modern Codes without exception. It is so in the Austrian Civil Code, (s. 183.) in the French Civil Code, (s. 350,) in the Sicilian Civil Code, (s. 274). Nay, the Chinese (barbarians as we deem them) go still further, for they punish the dismissal of an adopted child with a hundred bastinadoes. (Ta Tsing Leu Lee, 3. 78.)

3. Having established in our law the rule, that *actio personalis moritur cum personâ*, this sort of case must often occur: the father of a large family, dependent on him for support, is injured by the gross negligence of some other person, (for instance a body of Railway directors); he brings an action, in which, if he had happened to live, he would have recovered large damages; but he dies — the action dies with him, and his destitute family are left wholly without relief. Here the defendants have incurred an obligation

ex maleficio: would it not therefore be better to adopt the Roman maxim, "in his casibus actio in factum competit, quæ heredi datur?" (Justin. I. 4., 5. 3.)

4. *Treasure Trove* presents in our law some strange incongruities, whether viewed in its civil or criminal aspect. One would naturally suppose, that the finding of a treasure should produce the same, or nearly the same results in law, as the finding of anything else. It would seem reasonable, that if the original owner could be met with, the thing found should be restored to him, the law allowing, or perhaps compelling him to pay a reasonable reward to the finder; and that if no owner appeared, the finder should retain that benefit, which Providence had thrown in his way. Such, indeed, is the law in certain cases: for instance, in 1826, a Hackney coachman finding in his coach a bank-note of 300*l.*, took it immediately to the Commissioners, who under stat. 55 G. 3. c. 159. s. 9., awarded him out of it *Fifty Pounds*, restoring the remainder to the owner. Had no owner appeared, after the lapse of a year, the honest coachman would have been entitled, under the statute, to the whole 300*l.* But as to *Treasure-trove*:—In the first place, what is it in substance? "money or coin, gold, silver, plate, or bullion?" (Black. Com. 1., 295.) Therefore, if a man dig up a diamond worth 100,000*l.*, or a statue as valuable as the *Apollo Belvidere*, (no owner appearing,) it belongs to himself; but if it be but a coin of a penny, it goes to Her Majesty, or her grantee. Again, as to the place of finding—if it be on the earth, (no owner as before appearing,) money, gold, &c., however valuable, is the finder's: if on or under the sea, he has at all events, a right of salvage in it; but if under the earth, it is *treasure trove*, and belongs wholly to the Queen, or her grantee: nor does it make any difference, whether a man finds a treasure in his own grounds, or elsewhere. So much for the civil results. In the criminal view, the case is still more extraordinary. By our earliest known laws on the subject, the finder was not punishable at all, where the original owner was unknown; but, on the contrary, he acquired an entire property, as well in treasure as in other things found. (Bract. 3. 3.) Subsequently, however, he not only obtained no property by finding a treasure, but if

he concealed his discovery, he was punished with *Death* ! This monstrous change in the law is to be ascribed to the cupidity of the conquerors, in times of rebellion and invasion, when the affrighted inhabitants hid large sums in the earth ; a circumstance totally inconsistent with the present state of things. Nevertheless we continue to punish a delinquent finder, not indeed with death, but with fine, or imprisonment, or both. We confess, that to our apprehension the Roman Law was far more reasonable. It defined treasure "*condita ab ignotis dominis tempore vetustiori mobilia.*" (Leo, c. 10. 15. 1.) If the original owner, or his representative was known, the withholding the thing from him was deemed a theft, (Paulus D. 41., l. 31.), and as such, was punishable with a forfeiture of double the value. If such owner or representative could not be met with, the treasure, if found by a man in his own ground, was his own, being considered as "*Dei beneficium*" (Leo, ut sup.); if in the land of another private person, it was shared with him ; if in a royal domain, with the *Fiscus* : and in the two latter cases, a fraudulent concealment was deemed a theft. (Ib.)

5. The *malus animus*, (the legally-evil-mind,) being the most important object for consideration in criminal law, it becomes extremely material to inquire how that mental quality is appreciated, in any given legal system. The Roman law, from very early times, carefully distinguished this element of crime into two species, *dolus*, when there was a direct wilful intention to do wrong ; and *culpa*, when injury resulted from a want of that skill, care, or attention which the offender was legally bound to exercise. Plain and obvious as this distinction is, and carefully considered, as it always must be, in the *discretionary* award of punishment, it has no recognised place in our present criminal jurisprudence. Not only so, but we speak advisedly when we say, that to some eminent lawyers it is unknown, as a legal criterion of offences in general. It is better understood in those dependencies of the crown, where the Roman law is the common law of the land : and instances have even occurred, where the local judges, rightly and properly observing this distinction in their judgments, have been supposed at home to have erred ; merely because they did not confound

together notions, which the law they were administering had carefully kept apart. We are happy to perceive, that in the proposed "Act of Crimes and Punishments" laid before Parliament in 1844, an attempt has, for the first time, been made to establish a precise legal definition of the word "*culpable*" in contradistinction to "*malicious*," (c. 1. s. 3. art. 5.) and conformably to the Roman principle.

6. In the *Classification of Offences* we might adopt, by analogy, at least, to the Roman law, certain specific distinctions, with reference to the atrocity of the crime. "*Atroce* injuriam, aut personâ, aut tempore, aut re ipsâ fieri, Labeo ait. Personâ atrocior injuria fit; ut cùm Magistratui, aut Parenti fiat." (Ulpian, D. 47. 10. 7.) We shall be told, that judges and magistrates treat these offences as *aggravated* assaults or batteries, and punish them accordingly. But we think that this is not a matter, which should be left to any person's discretion. The law should stigmatise the crime with an odious name, and a degrading punishment. "There is one species of battery (says Blackstone, Comm. 4. 217.) more penal than the rest, which is, the beating of a clerk in orders, or clergyman." (St. 9. Edw. II. c. 3.) But with all our respect for the ecclesiastical character, we cannot but think (keeping in mind the fifth commandment) that the person of a *parent* ought, in the eyes of his child, to be as sacred as that of his spiritual pastor. Yet a case occurred not long since, where an unnatural ruffian beat his aged mother with most ferocious barbarity. In Scotland, this wretch would have been liable, under the statute of 1661, to capital punishment; but being brought before a London police magistrate, he was merely sentenced to two months' imprisonment! Two other classes of cases (too frequent, alas! in our police courts), demand the stigma of atrocity and the severity of *corporal* punishment. We allude to the injuries inflicted on *policemen*, when, endeavouring to prevent breaches of the peace; and, above all, to the unmanly and brutal attacks on *women*; which, till of late years, were regarded, by the very lowest of the populace, as cowardly, and degrading to the character of Englishmen.

In conclusion, we desire it to be clearly understood, that we are no blind admirers of the Roman law. Far from

viewing it, as a whole, with the veneration of those old commentators, who call it *ratio scripta*, "the perfection of human reason;" a code for all climes and races, and ages; we readily own that some of its provisions are barbarous and absurd; and that others bear the stamp of an odious despotism and bigotry, as bad, perhaps, as the legislation of our own Henry the Eighth: worse, they cannot be. But these circumstances must not blind us to the real merits of the great Roman jurists, those especially whose wisdom shines throughout the Digest; for they were men who, in their own times, held the highest judicial offices, and were regarded as living oracles of law — they possessed the inventive genius of the true lawyer, and knew the great art of applying the principles of law to the relations of life. In developing those principles, too, they proceeded with such consummate skill and method, as to draw from the celebrated Leibnitz the avowal, that "next to the writings of the geometricians, there is nothing which in force and subtlety can compare with the writings of the Roman Jurists." (*Opera*, 4. 267.) Hence it was, that the jurisprudence, which these great men first erected into a science, became the main well-spring of European legislation: and though, in many of its details, it is wholly unsuitable to our present wants; yet in its principles, it still lives and operates amongst us, and is capable (as we have shown) of contributing to the further improvement of our legal system. What we advocate, therefore, is not a pedantic and indiscriminate study of the *Corpus Juris*, and its commentaries; but a cultivation of its spirit; nor even to that would we devote the time, which other professional occupations more imperiously demand. Our wish is simply, that the study of the Roman law should be subsidiary to that of our national institutions — in short, that a knowledge of it should distinguish the accomplished English lawyer, just as classical attainments do the well-educated English gentleman.

ART. VII. — M. PHILIP DUPIN.

THE death of this great advocate and excellent lawyer in the flower of his age, the vigour of his faculties, and the undisputed possession of the first practice at the bar of France, is an event which has sadly struck the profession in that country, and which recalls the similar loss sustained by it in our own, when nearly twelve months ago, Sir William Follett was taken from us.

M. Philip Dupin was born in October, 1795, at Varzy, in the department of the Nièvre, where his family had long resided. He was the youngest brother of the celebrated lawyer and orator, now Procureur General, and for several years President of the Chamber of Deputies, and under him he was prepared for the same noble profession. To the pains affectionately and judiciously bestowed upon his education, his unremitting industry made suitable answer, and he entered upon the duties of the Bar at a time peculiarly fortunate for a person of learning and of talents. The slavery of the empire having succeeded to the barbarism of the Revolutionary anarchy, had in its turn been displaced by the Restoration, which brought back the importance of the gown, while it retained all the benefits of the Codes, and the unspeakable advantages to the profession as well as the community, of having swept away the confusion, the incumbrances, the rubbish of the old jurisprudence. — But there was another benefit conferred upon the Bar. — The division of property, and the multiplication of rights both individual and corporate, municipal and private, augmented exceedingly the mass of judicial business. The new and improved constitution of the courts, especially by the substitution of oral for written pleadings, and the introduction of jury, trial gave a new scope to the genius of the advocate, while as yet the numbers of the barristers offered no insuperable obstruction to the acquisition of practice, and their election, if successful, in the Parquet to sit in the legislature as well as their elevation to the magistracy by merit and not by inheritance or by

purchase, completed the happy change in their lot which the Revolution had brought about. The period of the Restoration has thus been not unaptly compared for its effect on the fortunes of the Bar to the early period of the Revolution for its operation on the lot of the army; and, as in 1794, 1795, and 1796, we saw young officers raised to the command of armies; so, in 1816, 1817, and 1818, we saw young barristers suddenly rise to the height of their professional ambition.

It was after this fortunate period, that in the year 1821, Philip Dupin was called to the bar, and he found a very different body of competitors for its emoluments and its honours, from that among whom his son will have to take his chance of rising to his place; for there are now above 800 in the list, (*Tableaux*) and above 1000 *stagiers*¹ not called to the bar but capable of managing causes. The profession is accordingly so incumbered that none but a very few leaders have any practice in important and gainful cases, the juniors being all thrown upon the criminal courts. When Philip Dupin entered the profession it was not so, and he rose almost immediately into considerable practice. He devoted himself to his profession exclusively, and his capacity of labour was the astonishment even of the most industrious lawyers. No exertion seemed to exhaust his spirits or fatigue his strength. He devoted himself to his clients; he never was known either to urge the incessant labour and want of refreshment which he had undergone, or the state of his health, in support of any application for delay. His maxim was that the advocate like the soldier must be ready for the conflict at any moment when the occasion may demand his service. He has been known to go upon a special retainer into the provinces, conduct a cause, return to Paris, drive straight to the Palais, and proceed with a case just begun to be heard, without taking an hour's rest. Once when the

¹ The *stage*, perch or resting-place, is an intermediate state for three years before being called to the Bar, and the *stagiers* are a kind of probationers, who resemble pleaders below the Bar with us, except that they can practise on obtaining certificates and after two years of the *stage*, which ours cannot do beyond pleading.

Seventh Chamber waited a few minutes for him for the great case of the *Lys d'Evreux*, he was speaking in the Testamentary Court, where he had for three hours been arguing a will case of importance, and full of complicated questions both of law and of account. He arrived out of breath, his countenance on fire with the excitement, and bathed in sweat with the fatigue he had been undergoing. The court and his adversary wished to grant a delay that seemed absolutely necessary; but he would not hear of it, and a bystander of the profession has said, "*Rarement sa parole fût plus incisive, plus spirituelle.*"

But he had far higher qualities than a capacity of labour, and an unbroken devotion to his professional duties. He made himself thoroughly master of every cause for which he was engaged, whether great or trifling; and he despised mere flower and sentiment, and declamation, as wholly beneath the manly vigour of his understanding. He was ever resolutely bent upon the point in issue, be it of law, be it of fact, and never cared for any thing but the success of his well sustained contention. He had a full and ready knowledge of the law, and was a complete master of practice in all its branches. Nor was he ever less able or less effective in one kind of cause than another. Indeed, they who saw him in an arbitration were struck with the perfection in which he discussed minutely, forcibly, but, as it were, conversationally, the whole details of the matter referred. His eloquence was of a very high order; for it combined the distinguishing qualities of the greatest advocates—perfectly clear—luminous in an extraordinary degree—precise as to a demonstration—full of point—not rarely abounding in declamation—occasionally lending itself to pathos. No advocate of the age at the French bar, except only, perhaps, his brother, could, in a few sentences, produce a more powerful, a more immediate effect. Others may easily be cited who excelled him, each in this or that particular quality of the orator; but no one can be named who combined in himself so large a number of rhetorical excellencies.

He rose rapidly to the very height of his profession, and is supposed to have enjoyed a larger professional income than any other ever gained. His profits were estimated at nearly

8000*l.* a year latterly; and this in France, is equal to what two or three times the amount would represent at our bar.¹ He was, without any dispute or doubt, the chief of the profession. "In this great family (a contemporary lawyer has said), which lives fraternally under the vaults of the *salle des pas perdus* (as we should say Westminster Hall), he was, as it were, hailed the monarch by universal suffrage. *Primus inter pares.*" In the legislature, of which he was a member, he did not take much part, being devoted to the law.

He was elected deputy of the Nièvre in 1831, which seat he subsequently declined. He was member and secretary of the general council of Nièvre for ten years. In 1842 he was elected deputy of L'Yonne for the arrondissement of Avallon, for which place he had sat for four sessions, and had been 'rapporteur' of many important 'projets de loi,' on the notarial on 'brevets and inventions (patents), and on the railroad to Strasbourg.' He was also member of the King's Privy Council, and he was the advocate to the 'Liste Civile' for fifteen years. For three years he gave *leçons de droit* to the Duke de Nemours, as his celebrated brother had himself given them to his royal highness's brother the Duke of Orleans.

So much labour, however, of body and of mind wore him out prematurely. A complaint in the trachea appeared last summer, and was soon found to be combined with a paralytic affection. He was compelled to suspend all his labour, and to seek in a southern climate both a milder winter and perfect repose. He left Paris in November, accompanied by an eminent physician, his friend and cottage companion. On his way through Provence, where he visited Lord Brougham, it was observed that the paralytic affection, of which he said nothing, had gained ground, and was the real malady under which he laboured; but his mind was as entire and active as ever, nor did his spirits flag; on the contrary, he visited the Isle St. Marguerite, in the neighbourhood of Cannes. Some weeks after, when he had settled at Pisa, the accounts showed an increase of the malady, and after the beginning of February they became so alarming, that his son, Eugene, set out, doubtful of finding him alive. In fact, he died two days after his arrival, on the 18th of February.

The sad solemnity of his funeral took place in March at

the parish church of the family, and it was attended by extraordinary manifestations of public respect. Some days before, on the passage of his remains through Avallon, the chief place of the district, the whole people had by a voluntary movement assembled to accompany the hearse, and a funeral service was performed in the church where the coffin was deposited for the night. On the day of the funeral there were assembled the Mayors of fourteen towns, and many sub-mayors, numerous deputations from the tribunals of Avallon, Nevers, and other places, the Juges de Paix of the district, the Prefects of the neighbouring departments, with the other constituted authorities; and the pall was borne by the two Prefects of the Yonne and Nièvre, the Deputy of Nièvre, the Advocate General, the Battonier (Chief of the Bar) of Paris, and the Mayor of Varzy, birthplace of the deceased. The speeches delivered, according to the very bad French custom on such occasions, were of course panegyrical, and of course dull and ill-timed. But a few sentences addressed by the Procureur General to his nephew were much and justly admired for their deep feeling and chastened taste.¹

The memoir of Philip Dupin which should omit to make mention of his moral excellence would be exceedingly imperfect. He was a man of the strictest integrity, of the most humane and generous feelings. His refusal of large sums was a thing well known in the profession, and so familiarly witnessed in him that it ceased to be marked. His professional honour was without a stain: and his conduct at the Bar is justly held up to all whom he has left behind him, as a model which if they may find it difficult to frame their own demeanor upon it, yet they ought to keep steadily before their eyes, and yield it the just tribute of their reverence, even if unable to make it the object of imitation.

¹ By far the finest and most appropriate instance of a funeral tribute paid to departed genius was the beautiful air sung by Lablache, Grisi, Tamburini, and Rubini from the *Puritani*, over the grave of Bellini. Its effect is described as having been magical. It was worth all the funeral orations that ever were delivered.

ART. VIII.—OF THE CASES FOR THE PROOF OF
WHICH MORE WITNESSES THAN ONE ARE
REQUIRED.

OUR readers are doubtless aware, that, as a general rule of English law, facts may be judicially proved by the uncorroborated testimony of a single witness; but as, perhaps, they are not equally well acquainted with the exceptions to this salutary rule, and as a knowledge of these exceptions cannot fail to be of practical value, we have thought it expedient to bestow a few pages in explaining and illustrating their extent and effect. In doing so, we have no intention of entering into an elaborate consideration of the statutes of treason, but we simply purpose to mention briefly some instances, in which those acts, and some other statutes and rules of law have regulated particular cases, taking them out of the operation of the general principles by which they would otherwise be governed. Thus, in regard to *treason* and misprision of treason, though by the common law these crimes were sufficiently proved by one credible witness¹, it has been deemed expedient to enact, that no person shall be indicted, tried, or attainted thereof, but upon the oaths and testimony of two lawful witnesses, either both to the same overt act, or one to one, and the other to another overt act of the same treason, unless the accused shall willingly, without violence, in open court confess the same: and further, that if two or more distinct treasons of divers heads or kinds shall be alleged in one indictment, one witness produced to prove one of these treasons, and another another, shall not be deemed to be two witnesses to the same treason.² This protective rule, which

¹ Foster, Cr. Law, 233.; M'Nally, Ev. 31.; R. v. Clare, 28 How. St. Tr. 887. 924.; Woodbeck v. Keller, 6 Cowen, 120.

² 7 W. 3. c. 3. ss. 2. 4.; extended to Ireland by 1 & 2 G. 4. c. 24. The acts of 1 Edw. 6. c. 12. s. 22.; 5 & 6 Ed. 6. c. 11. s. 12., and 1 & 2 Ph. & M. c. 10. s. 11., contain provisions of a like nature.

in England has remained in its present state since the days of King William the Third, and in Ireland was adopted in the year 1821, has been incorporated, with some slight variation, into the constitution of America¹, and may be met with in the statutes of most, if not all, of the States of the Union. The first notice that we have of this rule is in a repealed Act of the time of Henry the Eighth², and from the language there employed it appears probable, that the original reason for its adoption was that stated by Lord Nottingham on Lord Stafford's trial:—"Anciently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law, now and then in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor, and anciently heresy was treason; and from thence the parliament thought fit to appoint that two witnesses ought to be for proof of high treason."³ Its continuance in modern times may perhaps be ascribed, in part, to the obstinacy with which men cling to established forms of proceedings; in part, to the accused's oath and duty of allegiance, which may be supposed to counterpoise the information of a single witness;⁴ and, in part, to the heinousness of the crime of treason, which raises a presumption of innocence in favour of the accused; while the counter-presumption that, on so serious a trial, no witness could be guilty of criminative perjury, is forgotten.⁵ But, possibly, the best reason for the regulation is, that, on state trials, the prisoner has to contend against the whole power of the crown; that this power is especially liable to abuse in times of excitement and danger; that the law of treason is ill-defined, and worse understood; and that the consequences of a conviction, both to the accused and to his family, are savage and revolting. A man of calm reflection may, however, consider this last reason but an indifferent one; and may think that the legislature would

¹ "No person shall be convicted of treason, unless on the testimony of *two witnesses to the same overt act*, or on confession in open court." Const. U. S. art. 3. s. 3.; Laws, U. S., vol. ii. c. 36. s. 1.

² 25 H. 8. c. 14.

³ T. Raym. 408.

⁴ 4 Bl. Com. 358.

⁵ 3 Bentham, Ev. 391, 392.

confer no trifling benefit on the country, if it defined the law of treason with greater accuracy, and if, by abolishing alike the cruelties which make it abhorrent, and the protections which make it ridiculous, it rendered the punishment of traitors more certain and less barbarous.

Notwithstanding the above rule, any *collateral* matter, not conducing to the proof of the overt acts, may be proved by the testimony of a single witness, by the extrajudicial confession of the prisoner, or by any other evidence admissible at common law.¹ For instance, on an indictment for treason in adhering to the Queen's enemies, the fact that the prisoner is a subject of the British crown may be established by his admission, or by the testimony of one witness.²

It may be proper in this place to observe, that, in treason, and misprision of treason, no evidence can be given of any overt act, which is not expressly laid in the indictment.³ But the meaning of this rule is, not that the whole detail of facts should be set forth, but that no overt act, amounting to a *distinct independent charge*, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment, or unless it distinctly conduce to the proof of any of the overt acts which are laid.⁴ For instance, in *Layer's case*⁵, the prisoner's correspondence with the Pretender was allowed to be read in evidence, as tending directly to prove one overt act laid, namely, the conspiring to depose the King and to place the Pretender on the throne, though this correspondence was a substantive treason in itself⁶, and was not charged as an overt act in the indictment; and on the same ground, the publication of the Pretender's manifesto by Mr. Deacon, was read against him in 1746, as strongly proving with what intention he had joined the

¹ Foster, Cr. Law, 242.; 1 East, P. C. 130.

² R. v. Vaughan, 15 How. St. Tr. 535., per Lord Holt; Foster, C. L. 240. S. C.

³ 7 W. 3. c. 3. s. 8. This section is not incorporated in the Irish act of 1 & 2 G. 4. c. 24., but it being also a rule at common law, this would seem to be immaterial.

⁴ Foster, Cr. Law, 245.; 1 Earl, P. C. 121—123.

⁵ 16 How. St. Tr. 220—223.; Foster, Cr. L. 245, 246, S. C.

⁶ By 13 W. 3. c. 3. s. 2. See 17 G. 2. c. 39.

rebel army, and as supporting the overt act laid in the indictment of marching in a warlike manner to depose the King.¹ On the other hand, when Captain Vaughan was indicted for adhering to the king's enemies, and the overt act laid was his cruising on the king's subjects in the Loyal Clencarty, the court rejected evidence of his cruising in another vessel; as if it were true, it would be no sort of proof of the act, for which he was then to answer.² The rule, in fact, is not peculiar to prosecutions for treason; though, in consequence of the oppressive character of some former state prosecutions for that crime, it has been deemed expedient expressly to enact it in the later statutes of treason. It is nothing more than a particular application of a fundamental doctrine of the law of evidence, namely, that the proof must correspond with the allegations, and be confined to the point in issue. The issue in treason is, whether the prisoner committed that crime, by doing one or more of the treasonable acts stated in the indictment; as, in defamation, the question is, whether the defendant injured the plaintiff by maliciously uttering any of the slanders laid in the declaration; and evidence of collateral facts is admitted or rejected on the like principle, in either case, accordingly as it does or does not tend to establish the specific charge. Therefore the declarations of the prisoner, and seditious language, used by him, are admissible in evidence as explanatory of his conduct, and of the nature and object of the conspiracy, in which he was engaged.³ And in support of the overt act of treason in the county mentioned in the indictment, other acts of treason, though done in another county, may be given in evidence; subject, however, to be ultimately rejected, if the overt act, in corroboration of which they are tendered, is not proved to have been done in the county as laid.⁴

It remains to be noticed in connection with this subject, that

¹ *R. v. Deacon*, Foster, Cr. L. 9.; 18 How. St. Tr. 366., S. C.; *R. v. Wedderburn*, Foster, Cr. L. 22.; 18 How. St. Tr. 425, S. C.

² *R. v. Vaughan*, 15 How. St. Tr. 499, 500.; Foster, Cr. L. 246, S. C.

³ *R. v. Watson*, 2 Stark, R. 132—135.

⁴ *R. v. Lyster*, 16 How. St. Tr. 164.; *R. v. Deacon*, 18. id. 367.; Foster, Cr. L. 9, 10., S. C.; *R. v. Vane*, 6 How. St. Tr. 123—129.; 1 East, P. C. 125, 126.

the protective provisions of the statutes of treason¹ do not apply to the particular class of treasons, which consists in compassing or imagining the death or destruction, or any bodily harm tending to the death or destruction, maiming, or wounding of the Queen, when the overt act or acts alleged shall be the assassination of her Majesty, or any attempt to injure in any manner whatever her royal person; or to the misprisions of any such treason; but in all these cases the accused shall be indicted, arraigned, tried, and attainted, in the same manner, and according to the same course and order of trial, and *upon the like evidence*, as if he stood charged with murder; though upon conviction, judgment shall be given, and execution done as in other cases of high treason.²

It seems to have been formerly thought, that, in proof of the crime of *perjury*, two witnesses were necessary³; but this strictness, if it was ever the law, has long since been relaxed; the true principle of the rule being merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence.⁴ The oath of the opposing witness, therefore, will not avail, unless it be corroborated by material and independent circumstances; for otherwise, there would be nothing more than the oath of one man against another, and the scale of evidence being thus exactly balanced, it is obvious that the jury could not safely convict.⁵ So far the rule is founded on substantial justice.⁶ But it is not precisely accurate to say, that the corroborative circumstances must be tantamount to another witness; for they need not be such, as that proof of them, standing alone, would justify a conviction, in a case where the testimony of

¹ 7 Ann. c. 21.; 7 W. 3. c. 3.; 6 G. 3. c. 53. s. 3.

² 39 & 40 G. 3. c. 93.; 1 & 2 G. 4. c. 24. s. 2. Tr.; 5 & 6 Vic. c. 51. s. 1. Section 2 of this last act makes it a high misdemeanour to discharge or aim fire-arms, or throw or use any offensive matter or weapon with intent to injure or alarm Her Majesty.

³ This is said to have been the opinion of Lord Tenterden; 3 St. Ev. 860. n. (q.); R. v. Champney, 2 Lew. C. C. 259., per Coleridge, J.

⁴ See R. v. Lee, cited 2 Russ. C. & M. 650.

⁵ 4 Bl. Com. 358.; R. v. Gaynor, 1 Cr. & Dix, Tr. Cir. R. 142.; Jebb, C. C. 262, S. C.

⁶ R. v. Yates, C. & Marsh. 139., per Coleridge J.

a single witness would suffice for that purpose.¹ Thus, a letter written by the defendant, contradicting his statement on oath, will render it unnecessary to call a second witness.² Still, evidence confirmatory of the single accusing witness in some slight particulars only, will not be sufficient to warrant a conviction³; but it must, at least, be strongly corroborative of his testimony⁴; or, to use the quaint but energetic language of Chief Justice Parker, "a strong and clear evidence, and more numerous than the evidence given for the defendant."⁵

When there are several assignments of perjury in the same indictment, it does not seem to be clearly settled, whether, in addition to the testimony of a single witness, there must be corroborative proof with respect to each; but the better opinion is that such proof is necessary; and that too, although all the perjuries assigned were committed at one time and place.⁶ For instance, if a person, on putting in his schedule in the insolvent debtors' court, or on other the like occasion, has sworn that he has paid certain creditors, and is then indicted for perjury on several assignments, each specifying a particular creditor who has not been paid, a single witness with respect to each debt will not, it seems, suffice, though it may be very difficult to obtain any fuller evidence.⁷

The principle, that one witness, with corroborating circumstances, is sufficient to establish the charge of perjury, leads to the conclusion, that *without any witness directly to disprove what is sworn, circumstances alone*, when

¹ R. v. Gardiner, 8 C. & P. 737, per Patteson J., 2 Moo. C. C. 95., S. C.

² R. v. Mayhew, 6 C. & P. 315, per Lord Denman.

³ R. v. Yates, C. & Marsh. 139, per Coleridge, J.

⁴ R. v. Champneys, and R. v. Wigley, 2 Lew. C. C. 258, 259, *n.* per Coleridge, J.; Woodbeek v. Keller, 6 Cowen, 118. 121, per Sutherland J.

⁵ R. v. Muscot, 10 Mod. 194. See the State v. Molier, 1 Dev. 263. 265.; The State v. Hayward, 1 Nott & M'Lord, 547.; Clark's Executors v. Van Reinsdyk, 9 Cranch, 160.

⁶ R. v. Vizier, 12 A. & E. 324., per Lord Denman.

⁷ R. v. Parker, C. & Marsh. 639, 645—647, per Tindal, C. J. In R. v. Mudie, 1 M. & Rob. 128, 129., Lord Tenderden, under similar circumstances, refused to stop the case, saying that, if the defendant was convicted, he might move for a new trial. He was, however, acquitted.

they exist in documentary or written testimony, may combine to the same effect; as they may combine, altogether unaided by oral proof, except the evidence of their authenticity, to prove any other fact, connected with the declarations of persons, or the business of human life. The principle is, that circumstances necessarily make a part of the proofs of human transactions; that such as have been reduced to writing, in unequivocal terms, when the writing has been proved to be authentic, cannot be made more certain by evidence *aliunde*; and that such as have not been reduced to writing, whether they relate to the declarations or conduct of men, can only be proved by oral testimony. Accordingly it is now held, that a living witness of the *corpus delicti* may be dispensed with, and documentary or written evidence be relied upon, to convict of perjury, — *first*, where the falsehood of the matter sworn by the prisoner is directly proved by documentary or written evidence springing from himself, with circumstances showing the corrupt intent; *secondly*, in cases where the matter, so sworn, is contradicted by a public record, proved to have been well known to the prisoner, when he took the oath; the oath only being proved to have been taken; and *thirdly*, in cases where the party is charged with taking an oath, contrary to what he must necessarily have known to be true; the falsehood being shown by his own letters relating to the fact sworn to, or by any other written testimony, existing and being found in his possession, and which has been treated by him as containing the evidence of the fact recited in it.¹

If the evidence adduced in proof of the crime of perjury consists in *two opposing statements of the prisoner*, and nothing more, he cannot be convicted. For if one only

¹ U. S. v. Wood, 14 Peters, 430. 440—442. In this case, under the latter head of the rule here stated, it was held that, if the jury were satisfied of the corrupt intent, the prisoner might well be convicted of perjury in taking, at the custom-house in New York, the "owner's oath in cases where goods, wares, or merchandise have been actually purchased," upon the evidence of the invoice-book of his father, John Wood of Saddleworth, England, and of thirty-five letters from the prisoner to his father, disclosing a combination between them to defraud the United States, by invoicing and entering the goods shipped at less than their actual cost. The whole of this case deserves an attentive perusal.

was delivered under oath, it must be presumed, from the solemnity of the sanction, that that declaration was the truth, and the other an error, or a falsehood; though the latter, being inconsistent with what he has sworn, may form important evidence, with other circumstances, against him.¹ And if both the contradictory statements were delivered under oath, there is still nothing to show which of them is false, where no other evidence of the falsity is given.² If, indeed, it can be shown that, before making the statement on which perjury is assigned, the accused had been *tampered* with³, or if there be other circumstances in the case, tending to prove that the statement offered as evidence against the prisoner was in fact true, a legal conviction may be obtained⁴; and provided the nature of the statements was such that one of them must have been false to the *prisoner's knowledge*, slight corroborative evidence would probably be deemed sufficient. It must, however, be remembered, that it does not of necessity follow, that, because a man has given contradictory accounts of a transaction on two occasions, he has therefore committed perjury. For there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and from other circumstances subsequently be convinced, that he was wrong, and swear to the reverse, without meaning to swear falsely either time.⁵ Indeed, when a man merely

¹ See Alison's Principles of Crim. Law of Scotl., 481.

² *R. v. Wheatland*, 8 C. & P. 238. 241, per Gurney B.; *R. v. Gaynor*, 1 Cr. & Dix, Jr. Cir. R. 142.; *Jebb*, C. C. 262, S. C.; *R. v. Harris*, 5 B. & A. 926.

³ *Anon*, per Yates J., Lord Mansfield, Wilmut, and Aston Js. concurring; 5 B. & A. 939, 940, note. See the observations of Mr. Greaves on this case, in 2 Russ. C. & M. 653, note.

⁴ *R. v. Knill*, 5 B. & A. 929, 930, n.

⁵ Per Holroyd, J. in *re Holroyd*, 1 Lew. C. C. 270. This very reasonable doctrine is in perfect accordance with the rule of the Criminal Law of Scotland as laid down by Mr. Alison, in his lucid and elegant treatise on that subject, in the following terms:—"When contradictory and inconsistent oaths have been emitted, the mere contradiction is not decisive evidence of the existence of perjury in one or other of them; but the prosecutor must establish which was the true one, and libel on the other as containing the falsehood. Where depositions contradictory to each other have been emitted by the same person on the same matter, it may with certainty be concluded that one or other of them is false. But it is not relevant to infer perjury in so loose a manner; but the pro-

swears to the best of his *memory and belief*, it necessarily requires very strong proof to show that he is wilfully perjured.¹

It seems almost superfluous to add, that the rule requiring something more than the testimony of a single witness on indictments for perjury, is confined to the proof of the *falsity* of the matter on which the perjury is assigned. The holding of the court, therefore, the proceedings in it, the administering the oath, the evidence given by the prisoner, and, in short, all the facts, exclusive of the falsehood of the statement, which must be proved at the trial, may be established by any evidence that would be sufficient, were the prisoner charged with any other offence.²

In cases of *bastardy*, also, a man cannot be adjudged to be the putative father of an illegitimate child on the single testimony of the mother; but, before an order of affiliation can be made by the petty sessions³, or confirmed by the quarter sessions⁴, the evidence of the mother must be corroborated, in *some material particular*, by other testimony to the satisfaction of the justices; and the order will be bad, if it does not allege that the confirmatory evidence was material.⁵ This rule has been wisely established, in order to protect men from accusations, which profligate, designing, and interested women

secutor must go a step farther, and specify distinctly which of the two contains the falsehood, and peril his case upon the means he possesses of proving perjury in that deposition. To admit the opposite course, and allow the prosecutor to libel on both depositions, and make out his charge by comparing them together, without distinguishing which contains the truth and which the falsehood, would be directly contrary to the precision justly required in criminal proceedings. In the older practice this distinction does not seem to have been distinctly recognised; but it is now justly considered indispensable that the perjury should be specified as existing in one, and the other deposition referred to in *modum probationis*, to make out, along with other circumstances, where the truth really lay. See Alison's Princip. of Crim. Law of Scotl., 176.

¹ Sir N. Tindal C. J., in R. v. Parker, C. & Marsh. 645.

² 2 Russ. C. & M. 654.; 2 Hawk. P. C. c. 46. s. 10.

³ 7 & 8 Vict. c. 101. s. 3.

⁴ 8 & 9 Vict. c. 10. s. 6.

⁵ R. v. Read, 9 A. & E. 619.; 1 P. & D. 413, S. C.; 8 & 9 Vict. c. 10. s. 1., and Schedule, Nos. 7, 8. In R. v. Js. of Bucks, 14 L. J. N. S. M. C. 45., it was held, that all the evidence must be given upon oath, and that this fact must appear on the face of the order; but though the first point there ruled is still unquestionably the law, the second is no longer material, as the forms given in the Schedule of 8 & 9 Vict. c. 10. omit all mention of an oath, and s. 1 of that act declares the forms to be valid.

might easily make, and which, however false, it might be extremely difficult to disprove.

The principles above stated, in regard to the proof of perjury, apply with equal force to the case of *an answer in Chancery*. Formerly, when a material fact was directly put in issue by the answer, the Courts of Equity followed the maxim of the Roman law, *Responsio unius non omnino audiatur*, and required the evidence of two witnesses, as the foundation of a decree. But of late years the rule has been referred more strictly to the equitable principle on which it is founded, namely, the right to equal credit with any other witness which the defendant may claim in all cases where his answer is "positively, clearly, and precisely," responsive to any matter stated in the bill. For the plaintiff, by calling on the defendant to answer an allegation which he makes, thereby admits the answer to be evidence.¹ In such case, if the defendant in express terms negatives the allegations in the bill, and the bill is supported by the testimony of only a single witness, affirming what has been so denied, the Court will neither make a decree, nor send the case to be tried at law; but will simply dismiss the bill.² But the corroborating evidence of an additional witness, of a letter of the defendant³, or of other circumstances, may give a turn either way to the balance. And, indeed, the evidence arising from circumstances alone, may be stronger than the testimony of any single witness.⁴

In the Ecclesiastical Courts the rule requiring a plurality of witnesses is carried far beyond the verge of common sense; and, although no recent decision of those Courts has, we believe, been pronounced, expressly determining that five, seven, or more witnesses are essential to constitute full proof, yet the authority of Dr. Ayliffe, who states that, according to the canon law, this amount of evidence is required in

¹ Gressley, Ev. 4.

² Cooth v. Jackson, 6 Ves. 40, per Lord Eldon.

³ Keys v. Williams, 3 You. & Coll. 55.; Dawson v. Massey, 1 Ball & Bea. 234.

⁴ Pember v. Mathers, 1 Bro. Ch. R. 52.; 2 Story on Eq. § 1528.; Gressley, Ev. 4.; Clark v. Van Reimsdyk, 9 Cranch, 160.

some matters, has been very lately cited with apparent assent, if not approbation, by the learned Sir Herbert Jenner Fust.¹ The case, in support of which the above high authority was quoted, was a suit for a divorce.² In a previous action for criminal conversation, a special jury had given 500*l.* damages to the husband, who, with a *female* servant³, had found his wife and the adulterer together in bed. This last fact was deposed to by the servant; but as she was the only witness called to prove it, and as her testimony was uncorroborated, the learned Judge did not feel himself at liberty to grant the promoter's prayer. This doctrine that the testimony of a single witness, though *omni exceptione major*, is insufficient to support a decree in the Ecclesiastical Courts, when such testimony stands unsupported by adminicular circumstances, has been frequently propounded by Lord Stowell, both in suits for divorce⁴, for defamation⁵, and for brawling⁶; and, before the new Will Act was passed⁷, Sir John Nicholl disregarded similar evidence, as not amounting to

¹ *Evans v. Evans*, 1 Roberts, Ecc. R. 171. The passage cited from Ayliffe, Par. 444, is as follows:—"Full proof is made by two or three witnesses at the least. For there are some matters which, according to the canon law, do require five, seven, or more witnesses to make full proof." The same learned commentator, a little further on, after explaining that "*liquid* proof is that which appears to the judge from the act of Court, since that cannot properly be said to be manifest or notorious;" adds,—“By the canon law a Jew is not admitted to give evidence against a Christian, especially if he be a clergyman, for by that law, the proofs against a clergyman ought to be much clearer than against a layman,”—Par. 448. Dr. Ayliffe does not mention what matters require this superabundant proof, but we have already said (vol. i. p. 380, n.) that, in the case of a Cardinal charged with incontinence, the *probatio*, in order to be *plena*, must be established by no less than seven *eye* witnesses; so improbable does it appear to the Church that one of her highest dignitaries should be guilty of such an offence, and so anxious is she to avoid all possibility of judicial scandal. This is adopting with a vengeance the principles of David Hume with respect to miracles.

² *Evans v. Evans*, 1 Roberts. Ecc. R. 165.

³ The fact that the witness was a woman does not seem to have formed an element in the judgment of the Court, though Dr. Ayliffe assures his readers, with becoming gravity, that “by the canon law, more credit is given to male than to female witnesses.” Par. 545.

⁴ *Donellan v. Donellan*, 2 Hagg. 144 (Suppl.).

⁵ *Crompton v. Butler*, 1 Cons. R. 460.

⁶ *Hutchins v. Denziloe*, 1 Cons. R. 181, 182.

⁷ 7 W. 4. and 1 Vict. c. 26., which by s. 34. applies to wills made after the 1st of January, 1838.

legal proof of a testamentary act.¹ In the case, too, of *Mackenzie v. Yeo*², when a codicil was propounded, purporting to have been duly executed, and was deposed to by one attesting witness only, the other having married the legatee, Sir Herbert Jenner Fust refused to grant probate, though he admitted the witness was unexceptionable, on the ground that his testimony was not confirmed by adminicular circumstances, and that the probabilities of the case inclined against the factum of such an instrument. In another case³, however, the same learned Judge admitted a paper to probate on the testimony of one attesting witness, who had been examined a few days after the death of the testator, though the other witness, whose deposition had not been taken till two years and a half afterwards, declared that the will was not signed in his presence. In this case there was a formal attestation clause, and that fact was regarded by the Court as favouring the supposition of a due execution.

Though the cases cited above certainly establish beyond dispute, that, by the Canon Law, as recognised in our spiritual Courts, one uncorroborated witness is insufficient, they as certainly decide, that, in ordinary cases at least, two or more witnesses need not depose to the principal fact; but that it will suffice if one be called to swear to such fact, and the other or others speak merely to confirmatory circumstances. Nay, it would seem, from some expressions used, that, as in cases of perjury, documentary or written testimony, or the statements or conduct of the party libelled, may supply the place of a second witness.⁴ If, indeed, proceedings be instituted under the provisions of some statute, which expressly enacts that the offence shall be proved by two lawful witnesses, as for instance, the Act of 5 & 6 Edw. 6. c. 4., which

¹ *Theakston v. Marson*, 4 Hagg. 313, 314.

² 3 Curteis, 125.

³ *Gove v. Gawen*, 3 Curteis, 151.

⁴ In *Kenrick v. Kenrick*, 4 Hagg. 114., the testimony of a single witness to adultery being corroborated by evidence of the misconduct of the wife, was held to be sufficient, Sir John Nicholl distinctly stating, "that there need not be two witnesses; one witness and circumstances in corroboration are all that the law in these cases requires," p. 136, 137., and Dr. Lushington even admitting, that "he was not prepared to say that one clear and unimpeached witness was insufficient," p. 130. See also 3 Burn. Eccl. L. 304.

relates to brawling in a church or churchyard, the Court might feel some delicacy about presuming that such an enactment would be satisfied, by calling one witness to the fact and one to the circumstances.¹

It seems that this rule of the canonists depends less on the authority of the civilians than on the Mosaic code, which enacts, that one witness shall not rise up against a man for any iniquity; but at the mouth of two or three witnesses shall the matter be established.² Indeed, the decretal of Pope Gregory the Ninth, which enforces the observance of this doctrine³, expressly cites St. Paul as an authority, where he tells the Corinthians that “in ore duorum vel trium testium stat omne verbum.”⁴ Now, however well suited this rule might have been to the peculiar circumstances of the Jewish nation, who like the Hindus of old, the modern Greeks, and other enslaved and oppressed people, entertained no very exalted notions on the subject of truth; and who on one most remarkable occasion gave conclusive proof that even the necessity for calling two witnesses was no valid protection against the crime of perjury⁵; — it may well be doubted whether, in the present civilized age, such a doctrine, instead of a protection, has not become an impediment to justice, and whether, as such, it should not be abrogated. That this was the opinion of the Common Law Judges in far earlier times than the present, is apparent from several old decisions, which restrict the rule to causes of merely spiritual consequence, and determine, that all temporal matters which incidentally arise before the ecclesiastical courts may, and indeed must, be proved there, as elsewhere, by such evidence as the Common Law would allow.⁶ If, therefore, the Spiritual Courts refuse to admit proof of the payment or release of a legacy, or of plene administravit, by a single witness, the court of Queen’s Bench will grant a prohibition.

¹ Hutchins v. Denziloe, 1 Cons. R. 182., per Lord Stowell.

² Deut. c. 19. v. 15.; Deut. c. 17. v. 6.; Numbers, c. 35. v. 30.

³ Dec. Greg. lib. 2. tit. 20. cap. 23.

⁴ 2 Cor. c. 13. v. 1.

⁵ St. Matthew, ch. 26. v. 60, 61.

⁶ Richardson v. Desborough, Ventr. 291.; Shotter v. Friend, 2 Salk, 547; Breedon v. Gill, Lord Raym. 221. See further, 3 Burn. Eccl. L. 304—308.

ART. IX. — M. MOLE.

THERE are not many names in the annals of jurisprudence and of judicature more illustrious than that which the ex-minister and ex-chancellor of France wears by descent, from the celebrated and virtuous Mathieu Molé, whom he represents in blood as in possessions, in the fifth generation, and though he has never been distinguished in the same career, not belonging to our profession, yet his great and acknowledged talents, his firmness on many trying occasions, both under the Empire and the Restoration, his distinction as prime minister since the three days of 1830, and his manners, alike noble and winning, have certainly given a new illustration to the family of the great judge and minister of justice, whose memory is cherished with such universal respect and affection in France.

M. Molé, known for principles as much alien to violence and rashness and exaggeration, as favourable to temperate reforms, is an honorary member with the Duc de Broglie, Messrs. Dupin, Berryer, and Guizot of our Law Amendment Society, and is understood to take a lively interest in all legal improvements. We are now therefore discharging a duty alike pleasing to ourselves and grateful to the profession in bringing before our readers one of his latest speeches, the celebrated reply which he delivered last January as Director of the French Institute, to the discourse pronounced on his admission by a literary man of no great mark in his own country and wholly unknown elsewhere, the Count Alfred de Vigny, author of many historical romances, a species of composition which we entirely agree with M. Le Comte Molé in regarding at all times with great suspicion, often with extreme repugnance; sometimes, indeed, not seldom, with unmixed reprobation, as calculated to corrupt the public taste, and to taint the stream of historical truth.

Unhappily, however, for the worthy *recipiendaire* his inauguration address was a tissue of misrepresentations of

known facts in very recent history, of misconstruction put upon conduct and character little known to himself, though full well to his formidable and experienced censor, of glosses upon sentiments and of words which he could only know at second, third, or fourth hand, but which Count Molé was intimately and familiarly acquainted with. Hence, the exposition which now lies before us was drawn very naturally, very easily, very much as the Italians have it *con amore* from the minister as well of Napoleon as of Louis Philippe: and the rebuke was administered with a hand extremely strong, though with a finger perfectly delicate, in a discourse showing as much of the combined *suaviter* and *fortiter* as we have ever happened to see united in any composition, and which is said at Paris to have drawn from one of our countrymen lately in that capital the remark that if the razor which cut had been dipped in salad oil, the oil poured over the wound was rather of vitriol.

• We must premise to our further description of this admirable piece a few words upon the manner in which these discussions are prepared and carried on in the National Institute of France. No one who reads the perfectly finished composition of M. Molé can for a moment imagine that it was delivered immediately after the speech to which it is an answer — that is, delivered extempore, or on hearing M. de Vigny for the first time. It may safely be affirmed that the utmost practice, with the greatest powers of extempore elocution, never could have at once created so artistically framed a speech. The fact is this: When the newly admitted member has prepared his inaugural address, he deposits it with the secretary in writing, and the Director, upon whom devolves the duty of making a reply on the part of the Institute, has free access to it. Both the discourses are then submitted to a Committee, in order to prevent the introduction of improper topics, and to exclude, in the treatment of becoming ones, any faults such as might commit the illustrious body to which the parties belong. This proceeding, of course, took place on the present occasion, and the result is the speech of Count Molé now before us.

It begins with a beautiful panegyric of Royer Collard, apparently suggested by M. de Vigny having suppressed

all mention of that able person, and preferred praising men of a taste less severe. But in his praise of Etienne, M. Molé willingly joins, just remarking as he passes that not having known almost any thing of him, M. de Vigny could have no great right to handle the subject. His own description of that admirable writer is therefore somewhat invidiously but for us very advantageously substituted to the ignorant and therefore vague and fanciful eulogy of the worthy and superficial *recipiendaire*. "Vous n'avez pas joui comme nous de cette égalité d'humeur, de cette politesse bienveillante et nuancée, de ces entretiens si instructifs ou se retrouvoient cette fine raillerie, ce langage si flexible, si elegant, si concis, et si pur que vous venez d'apprécier avec tant de justesse dans son théâtre et dans son polémique." We next have a severe hit at the good reception which Etienne had given De Vigny and his writings; for it is plainly insinuated that the taste of a man formed in the school of Voltaire and the great writers, could never have really approved of De Vigny; "malgré l'accueil plein d'obligeance que vous avez fait M. Etienne, et la justice qu'il s'est plu à vous rendre, il a été fidele jusqu'à la fin aux mêmes traditions littéraires. Il était, en un mot, de ceux qui s'abreuvent au moins timidement à ces sources regeneratrices dont vous vous applaudissiez tout à l'heure d'avoir ouvert les ecluses avec l'aide de vos amis."

After these touches, which must have gone near to the quick, we have a battery not masked but fairly opened to demolish some ill-placed flattery of Etienne, and of the Restoration, at the expense of the Empire; and probably the new member under its fire wished either himself or his assailant wherever the Emperor Napoleon may now be — were the exposure ever so sultry. The hapless neophyte of the Institute had mentioned a certain representation of M. Etienne's *Intrigante*, to which, says the pitiless Director, "vous avez attaché une importance qu'elle ne comportait pas," and he adds that praises had been also lavished on it, "que certainement M. Etienne n'aurait point acceptés." De Vigny had spoken of "des familles françaises se derobant par la fuite à des firmans qui marioient comme récompense une jeune esclave à un janissaire." The allusion was to

Napoleon bestowing on his generals the hands of young heiresses: but no sooner had the phrase passed his lips than the general indignation made him retract it. This does not, however, silence Count Molé, a statesman and minister of the Empire, and who really knew the things which the ignorant and fanciful *recipiendaire* only had heard of in the newspapers and coffee-houses. The count declares that Etienne would have scorned such trashy eulogies. "Il a pu constater et déplorer comme moi à cette époque les abus de la puissance lorsqu'il y en a eu; et aussi et plus encore, qu'il se trouvât des pères et des mères à qui l'ambition ou le soin de leur fortune faisait marier leurs filles selon le gré présumé du maître, plutôt que selon leur penchant. Mais jamais il n'y a eu parmi nous alors ni jeunes esclaves, ni janissaires: jamais M. Etienne n'aurait reconnu sous ce nom les soldats ou les généraux de Marengo, d'Austerlitz, et de Jena."—He then proves the total inaccuracy of De Vigny's comments on the first representations of the *Intriguante*, and adds: "Quant à cette autre représentation à Saint Cloud, dont vous avez parlé avec autant d'émotion que si vous y aviez assisté, je n'ai pu qu'admirer cette puissance merveilleuse de l'imagination et du talent, qui donne consistance et vie à tout ce qu'elle touche, se transporte à travers le temps face à face de ce qu'elle veut peindre, et supplée à la réalité par la magie des couleurs."—Is it possible to accuse a person more delicately of gross falsehood and fabrication?

Then follows on the occasion of mentioning M. de Vigny's Historical Romance of *Cinque-Mars*, a most just and admirably written exposition of the mischiefs of that wretched species of composition, and its "atteintes si profondes à la vérité et par conséquent à la moralité de l'Histoire." But after doing justice to Sir W. Scott's *Old Mortality*, which "revives the past, and places all the drama of human life in the midst of real institutions and manners that have ceased to exist,"—he adds, "Tel n'a pas été votre dessein dans Cinque-Mars. C'est l'Histoire elle-même arrangée avec art mais arrangée en Roman. Tous les faits y sont empoultés à nos annales et il en est bien peu auxquels votre imagination si fertile et si brillante ait laissé tout leur identité."—He goes on to show his gross blunders too. "Si

vous eussiez été content de faire revivre le père Joseph mort quatre ans auparavant," &c. &c. And he then shows how every party had been travestied by this Historical Romancer.

Then we have a severe rebuke administered on account of the *Canne de Jonc*, beginning with these words: "Je défierais, je vous le jure, quiconque aurait approché de l'Empereur, fut-ce son plus mortel ennemi, de ne pas éprouver un peu de ce que j'ai ressenti en lisant cette scène, cette prétendue conversation à Fontainebleau entre lui et le venerable Pie VII," &c. &c. He adds, naturally enough, "Qu'il me soit permis de hasarder ici une réflexion. Au milieu de cette multitude de romans historiques, de mémoires supposés, de biographies contemporains qui ont paru depuis un quart de siècle, il deviendrait impossible, je le déclare, de savoir la vérité sur rien, ni le vrai sur personne." —

We next have the Director's *painful* duty performed upon M. De Vigny's chef d'œuvre, the *Stello*; but we can afford no room for an extract.

We conclude by citing the close of this beautiful address; but though mild and quiet and calm as "peroration be- seems," according to all the rules of a severe taste, it pursues to the end the little mitigated severity of the critic, *ab incepto*; for no one can for a moment be in any doubt as to the meaning of the passage, and especially the closing sentence, and that the passing and vain and worthless contemporary triumphs of M. de Vigny's writings is the main subject, and to weigh its real importance and ascertain its true value the only object of the passage.

"Maintenant qu'en toute chose le système préventif est abandonné, c'est aux contemporains d'abord, et à la postérité ensuite, que la répression est confiée; c'est à eux de juger les œuvres que le génie de l'homme aura conçues et exécutées dans sa pleine et entière liberté. Ainsi donc, que l'écrivain, que l'artiste se mette à l'œuvre en écoutant la voix intérieure qui lui parle, que chacun consulte en lui-même cette image du beau qu'il a apportée en naissant, mais que la manière dont il a su garder et gouverner son âme, a pu, qu'il ne l'oublie pas, conserver pure, ou dénaturer et obscurcir. Que d'autres diffèrent autant qu'ils le voudront d'un passé

qu'ils se sentent la force de mépriser ; mais que l'orgueil d'innover sache se préserver au moins de la tentation d'imiter. On n'est original qu'à son insu. Le moindre effort pour le paraître empêche nécessairement de le devenir. Il n'y a de nouveauté, d'originalité inépuisable que dans le naturel, quedans l'homme tel qu'il est. Je voudrais, je l'avouerai, voir adopter le programme du classique, moins les entraves ; du romantique, moins le factice, l'affectation et l'enflure. Les hommes semblent s'entendre d'un bout de la civilisation à l'autre pour recueillir en ce moment tous les fruits que la liberté peut produire. Les institutions, les mœurs, les lettres, les arts, tout y concourt, tout y participe à la fois ; et ce qui prouve plus que tout le reste le vus de la Providence, c'est le prince qu'elle tenait en réserve pour leur accomplissement. Né près du trône, il n'avait aucun des préjugés que donnent souvent à ceux qui y montent leur naissance et leur éducation. Au niveau de son temps dont il n'a que les lumières, il le comprend, il le dirige sans jamais s'associer à ses préventions. Protecteur le plus éclairé des lettres, il sait que de nos jours le meilleur et le plus noble service à leur rendre, c'est d'en assurer la plus complète indépendance. Chaque époque, Monsieur, a sa littérature, qui est l'expression de ses mœurs, de ses passions, de ses goûts. Mais entre les ouvrages dont elle brille, il faut en distinguer de deux natures : les uns, d'un mérite relatif, appropriés au plus grand nombre des lecteurs, obtiennent de bruyants applaudissements ; c'est le triomphe contemporain : les autres, puisés aux sources des éternelles vérités, et de ce beau dont l'homme a seul le sentiment sur la terre, reçoivent d'abord un accueil moins éclatant, et attendent le jugement de cette élite de notre espèce dont la voix répétée de siècle en siècle, depuis Homère, s'appelle la renommée, s'appelle la gloire, et redit à l'avenir les noms qui ne périssent pas."

It is known that in consequence of the severe handling which he had received, M. de Vigny declined submitting to the accustomed ceremonial of being presented to the King by the Director, which the etiquette required. Hereupon the wits of Paris said that it would never have done for the *Molt* to have presented the *Immolé*.

ART. X. — LAW OF DEBTOR AND CREDITOR.¹

1. *Letter to Sir Robert Peel on the Abolition of Imprisonment for Debt.* By Mr. Commissioner FANE. Sweet, 1838.
2. *Observations on Bankruptcy and Insolvency.* By W. H. ASHURST. Dinnis, 1838.
3. *Credit, the Life of Commerce, being a Defence of the British Merchants against the demoralising Tendency of the recent Alterations in the Laws of Debtor and Creditor.* By J. H. ELLIOT. Madden and Co., 1845.
4. *Paper on the Law of Debtor and Creditor.* Printed by Order of the Society for Promoting the Amendment of the Law. By Mr. Commissioner FANE. 1845.
5. *A Bill to amend the Laws relating to Bankruptcy and Insolvency.* April 8, 1846.

THE Law of Debtor and Creditor has long been in the transition state—a state by no means beneficial to either party. The law should be certain, and rarely changed; never without some overwhelming necessity. When the law is known, every one shapes his course accordingly. If the creditor's remedy be cheap and immediate, the thought how soon and how surely the consequences of folly will recoil upon him, may make the debtor pause even in the height of his extravagance; while, on the other hand, if the creditor's remedy be slow, costly, and uncertain, the debtor will boldly incur any obligation, sure of present enjoyment, and careless of suffering which may never befall him. Under the one system, the tone of public morality, as to the necessity of fulfilling pecuniary obligations, would be high; under the other, it would probably be extremely low; and the word, "repudiation," might become as current on the eastern, as it is on the western side of the Atlantic. We have for the last few years been drifting westwards: we are becoming repudiators.

¹ It must be understood that we do not hold ourselves responsible for all the sentiments expressed in this article; but we are desirous at the present time of having the fullest discussion of the subject. — Ed.

It cannot be denied, that the old Law of Debtor and Creditor was unjust, cruel, and absurd. It was unjust, for it took no pains to ascertain whether the debt was really due before issuing its process. All it required was, that the creditor should swear positively to the debt: that done, the process issued. When a debtor applied, in 1752, for his discharge, on an affidavit showing that the arrest was without pretence, the Court said ¹, "The Plaintiff having sworn positively that the Defendant is indebted, it is the *known course* of the Court that we cannot receive any affidavit to explain or contradict the Plaintiff's oath; even an affidavit of the Plaintiff's confession that the Defendant owes him nothing cannot be received. It may be inconvenient to the debtor, yet there would be ten times more inconvenience if we were to try whether Plaintiff swears true." Now the plain English of this was, that it would occupy less time to do injustice without inquiry, than to do justice after inquiry.

The oppression which resulted from this may readily be imagined. The Commissioners, who reported on imprisonment for debt in 1832, mentioned a great many most revolting cases;—one, where an uncertificated bankrupt arrested all his assignees for 40,000*l*. Against such abuses there was no security; because, said the Judges, "*the plaintiff's oath must not be contradicted.*"

A few years ago an amusing case came under our own notice. A literary gentleman had composed a work more useful than attractive. Unable to procure the assistance of a rich publisher, he was obliged to content himself with a poor one, and each was to find what money he could. Before the work was ready the funds of both were exhausted. They engaged in bill transactions, and a complicated account resulted, the balance of which each thought was in his own favour. The publisher, becoming dissatisfied with the author, arrested him for 200*l*. The author, unable to find bail, had no prospect before him but relief from the Insolvent Debtor's Court, with public disgrace. At this juncture a friend suggested to him that, as he really thought the balance

¹ *Emerson v. Hawkins*, 1 Wils. 335.

was in his favour, he had better arrest the publisher, who might then purchase his own release by granting a similar indulgence to him. This excellent device was tried and succeeded, and thus by a curious species of set-off (which might well be called an equitable set-off), two acts of equal injustice resulted in justice. It is probably the only instance on record of two wrongs making a right.

The old law was as cruel as it was unjust, for it assumed that every man *could* pay who *would*, and then in a truly logical spirit, set about compelling the debtor to do what it assumed he *could* do, by imprisoning him till he did it, and of course, in all cases, where the debtor did not pay, because he could not, these legal assumptions inflicted on him the penalty called "rotting in gaol."

The law was also absurd, because whilst it separated the debtor from his family and debarred him from the pursuits of industry, it actually allowed him to retain about his person the means of payment even in the current coin of the realm. A debtor was once robbed of 1200 sovereigns within the prison walls. Nor was this strange state of things without some excuse, for so long as the system prevailed of keeping men in prison till they fulfilled engagements which they could not fulfil, it seemed an unavoidable evil to allow them to keep part of their funds for their own subsistence. If they paid the first, second, and third creditors, and so emptied their pockets entirely, still there might be a fourth, who would throw them into prison, and keep them there to starve. Thus one legal injustice begat another. Then some debtors were perfectly guiltless, some even blameless; occasionally an unfortunate person was thrown into prison, whose inability to pay arose from the villany of some fraudulent trustee; such an one was an object of compassion, not of severity. Even in the worst cases there were the wives and families of the debtors, all of whom, though guiltless, were involved in the parent's distress.

The injustice, cruelty, and folly of the law, aided by the extortion of bailiffs, and the disgraceful state of debtors' prisons, by degrees created in men's minds an intense feeling of disgust against the law. Wrong from one member of the

community to another, excites only a momentary feeling, and the story is soon forgotten, or effaced by something new; but wrong, proceeding, not from an individual, but from the law,—not from one, who lays claim to no peculiar exemption from human weaknesses or vices, but from an institution, claiming to be itself the very embodiment and organ of justice,—excites a deep-seated feeling of indignation: and it becomes vain and useless for those, who practically know, that in nine cases out of ten, or even in ninety-nine out of a hundred, the law not only does no wrong, but is a most useful instrument of right, to argue in support of the law. Public indignation turns a deaf ear to all argument, doggedly insists on sweeping away the whole law, and cares not, though it involve *uses* as well as abuses in one common ruin.

Such was the case here. Gradually the tide of public opinion swelled: at first were heard the voices of a few, a few crying in the wilderness of general apathy: their arguments, however, reached some; these latter joined the cry; the cry swelled; the stupid opponents of all reform, rational as well as irrational, those men, who upon principle refuse to hear the voice of the charmer, charm—he never so wisely, if the voice be the voice of Reform, disregarded the cry, and doggedly adhered to all the foolish barbarities of the law. Though they must have felt the folly of permitting the rich debtor to live luxuriously in prison or in the rules, on the property withheld from his creditors, paying the gaoler for a day rule to go and dine in splendour with a West-end friend, (we ourselves once met such an one, and a charming companion he was,) and must have had some qualms of conscience at allowing poor debtors to live for years in gaol on prison allowance, die there, and be buried at the parish expense, yet they never took a single step to remove these evils, except the establishing of the Insolvent Debtors' Court, which left them almost untouched. At last general Reform, so long demanded, and so long delayed, found its way even into the very system of government, and one of its first results was the Act for creating a Court of Bankruptcy—an admirable law, which we owe to the vigour and resolution of the most steady of Law Reformers, Lord Brougham.

That Act, however, having left Imprisonment for Debt

untouched, the public feeling against it continued unabated, and in 1838, after six more years had elapsed, the great blow was struck — ARREST ON MESNE PROCESS WAS ABOLISHED.

The weight of this blow consisted as much in its *collateral*, as in its direct effects. If it had produced no other effect than that of depriving the creditor of his only useful remedy against the *person*, it would still have been a great blow; but the effect went further, it deprived him substantially of his only useful remedy against the *property* of his debtor. From time immemorial, creditors had had two modes of proceeding against the person, and two modes of proceeding against property; against the person, imprisonment on mesne process, and imprisonment in execution; against the property, seizure by each creditor for himself, and seizure by one creditor for all, that is, process in Bankruptcy. Of the processes against the *person*, imprisonment on mesne process was an invaluable remedy, imprisonment in execution, comparatively useless; — of the processes against the property, the process in bankruptcy was an invaluable remedy; seizure by one creditor for himself alone was not only valueless, it was even mischievous; because it was always used for purposes either of fraud or injustice: of fraud, in the great majority of cases; injustice, in the rest. This point is very clearly explained in Mr. Commissioner Fane's paper of 1845, read to the Law Amendment Society. But how, it may be asked, did the abolition of arrest on mesne process deprive the creditor of *both* his useful remedies? it deprived him of one remedy against the person, but how did it deprive him of his only useful remedy against the property? Mr. Fane's letter of 1838 explains this.

“The bankrupt law has long since declared certain acts, done by a trader, to be ‘acts of bankruptcy,’ or, in other words, ‘tests of insolvency:’ almost all are acts done to avoid an arrest, and in practice, the arrest, which it is sought to avoid, is *arrest on mesne process*. A trader leaves his house or place of business: there is nothing in this: every trader must do so every day of his life; but if he leaves *with a view to avoid an arrest*, the law declares that this is an act of bankruptcy. A trader closes his doors: there is nothing in this: he may do so for many reasons; but if he does *so to avoid an arrest*, the law declares that this is an act of

bankruptcy. A trader is walking along the street, and suddenly turns round, and moves in a new direction; there is nothing in this: he may have forgotten something; but, if he turns because he saw, or thought he saw, a sheriff's officer coming to arrest him, the law declares that this is an act of bankruptcy. A trader desires his servants to deny him to all comers: there is nothing in this: he may be unwell, or too much engaged to see any one; but if he gives such direction to avoid an arrest, the law declares that this also is an act of bankruptcy. These are the most common tests of insolvency, and in all it is the supposed motive, which constitutes the test. The act of bankruptcy, which perhaps comes next in point of frequency, is the lying in prison a certain time under an arrest on mesne process without finding bail. The abolition of imprisonment for debt on mesne process will of course abolish all these acts of bankruptcy.

“These acts of bankruptcy may be called involuntary, because a trader can hardly avoid committing one of them, if his creditors wish to force him into bankruptcy. There are others, which at first sight may appear to be voluntary acts; such as the execution by a debtor of a deed, conveying all his property to trustees for his creditors, or the inserting a declaration of insolvency in the Gazette; but even into these the trader is for the most part forced by the dread of imprisonment; so that, ultimately, it is the fear of imprisonment which is the great source of all acts of bankruptcy. Abolish the imprisonment, and you will of course abolish all its consequences; and, amongst others, the common motive for committing any act of bankruptcy, voluntary or involuntary.”

In consequence of Mr. Fane's Pamphlet, Mr. Freshfield procured at a very late stage of the measure the insertion of a clause¹ which created a new Act of Bankruptcy by

“Authorising a creditor to file an affidavit of his debt, and declaring, that, if within twenty-one days after the service of such affidavit on the debtor, together with a notice to pay the debt sworn to, the debtor did not give bail, either to pay such sum as might be adjudged to be due, or to render himself to prison, the debtor should on the twenty-second day be deemed to have committed an act of bankruptcy:”

and with this attempt at a remedy the bill passed. For four years that provision was the only one of which a creditor could avail himself against a resisting trader; but it

¹ 1 & 2 Vict. c. 110. s. 8.

was very ineffective, because the act of bankruptcy to which it might lead was to date, not as in case of arrest from the first arrest, but twenty-two days at least after the debtor had had ample warning that, if he intended to cheat his creditors, he had no more time to lose.

Serious, however, as was the blow struck in 1838, its weight was greatly aggravated by an act, passed in the following year 1839, entitled "An Act for the better protection of parties, dealing with persons liable to the Bankrupt Laws¹," but which might have been more fitly entitled "An Act to enable a bankrupt more effectually to cheat his creditors up to the latest moment before his bankruptcy." To make this clearly intelligible it is necessary to give a short account of the bankruptcy doctrine, called "Relation to the Act of Bankruptcy, and the use made of it up to 1839, in preventing fraudulent alienations of property on the eve of Bankruptcy."

The Common Law has always recognized the right of each creditor to do the best he could for himself, and if possible to get payment of his own debt in full. The Statute Law has established the right of equal distribution in cases of trade; but to bring that right into action a fiat of bankruptcy must issue; and, until it does, the rights, which the common law gives, may be enforced. There has always been of course great difficulty in giving these two contradictory principles an harmonious action.

The trader *will* struggle on to the last; he *will* conceal the desperate state of his affairs, and will raise money at a ruinous sacrifice, to settle the demands of his more importunate creditors, and so postpone the evil day; and, when it must come, he has always been found too apt, either to execute some voluntary instrument, conveying away the remnant of his property to a favoured creditor, or to give a private intimation by anonymous letter or otherwise, to some favoured creditor already armed with a warrant of attorney to enter up judgment, and thus enable that creditor, under a semblance of hostility, to seize what in reality the debtor is anxious he should seize. Against this danger the Legislature and the Judges have both attempted to provide; the Judges,

¹ 2 & 3 Vict. c. 29.

by laying down, as a general principle of the Common Law, that a fraudulent preference of one creditor over the rest in contemplation of bankruptcy is void against assignees; the Legislature, by a law passed so long ago as the thirteenth year of Queen Elizabeth. The provision made by the Judges has always been of little use, because a fraudulent preference is defined to be a *voluntary* act on the part of the debtor, and wherever the debtor wished to prefer a friend, all that he had to do to evade the law was secretly to desire the friend to *threaten* him with law proceedings: the friend of course threatened; and by the threat the act done was taken out of the law of fraudulent preference. On the other hand, the legislative provision, instead of not being effective enough, was *too* effective: like too many Act-of-Parliament expedients, it was of a somewhat clumsy nature, for, whilst redressing one set of wrongs, fraudulent preferences, it occasioned others at least as great.

The enactment¹ was,

“That the Commissioners’ assignment of the bankrupts property to the assignees should operate, not only against the bankrupt, &c., but also ‘*against all persons claiming under the bankrupt by any act done after he became bankrupt.*’”

Upon this the question arose, to what period did the words “after he became bankrupt” refer? And it was decided that they referred to the time, however distant, when the bankrupt committed his *first act of bankruptcy*, and thus the doctrine of Relation to the Act of Bankruptcy was established; under which all acts, *however fair*, done by a bankrupt after an act of bankruptcy, *however secret or distant*, were held void.

Of course, under such a law, fraudulent preferences were defeated; but, unfortunately, the legal net was wide enough to embrace honest transactions as well as dishonest ones; and it therefore frequently acted with the most cruel injustice towards persons who had honestly dealt with the bankrupt months, and sometimes years, before the public declaration of bankruptcy. So slowly, however, are wrongs done by par-

¹ 13 Eliz. c. 7. s. 2. at the end.

liament, redressed by parliament, that no mitigation of the wrong took place in the reign of Elizabeth; two trifling ones only in the reign of James (one of which only provided that an *honest* transaction should not be set aside after the lapse of five years!), and one equally trifling in that of George II.; nor did any real mitigation take place till the year 1806, although in 1749, Lord Hardwicke¹ had characterised a demand made under this law as “*stricti juris*, and the hardest case the law of England admits;” and in 1768, the Court of King’s Bench² had exclaimed, “This is a case *strictissimi juris*, and the relation of which the assignees would take advantage is an *odious* one.” At last, in 1806³, after the injustice had existed 235 years, a substantial and very sensible reform was effected by cutting down the relation to a secret act of bankruptcy, from an indefinite to a reasonably definite period, namely, two calendar months next before the issuing of the fiat; and so the law continued, with trifling modifications, till the mischievous act of 1839 was passed, by which it was enacted, in substance,

“That all contracts and conveyances of the bankrupt made *before the date of the fiat*, and all seizures of his property under process of law executed *before the date of the fiat* should be valid against the assignees, notwithstanding any secret act of bankruptcy;

and thus the two months of debateable ground was removed, and the greatest facility given to bankrupts to cheat their creditors up to the very last moment before the public bankruptcy.

Between 1806 and 1838 the law, though it might have been better, was, on the whole, not ill-adapted to the exigencies of society. The law of arrest on mesne process enabled the creditor, by a cheap and sudden process, to drive his debtor into bankruptcy; and the law of Relation to the Act of Bankruptcy, qualified by the two months’ limitation, enabled the assignees under the bankruptcy to recall unfair alienations of property which had taken place recently before the bankruptcy; when rapidly, between the 15th of August, 1838, and the 19th of July, 1839, in less than one year, two

¹ *Billon v. Hyde*, 1 Ves. Sen. 326.

² *Clarke v. Ryall*, 1 Blacks. 642.

³ 46 G. 3. c. 135. ss. 1, 2, 3.

laws came, one to enfeeble the creditor by depriving him of his only useful remedy against either person or property, and the other to give to the debtor a giant's strength — TO CHEAT !

Still the worst imprisonment, imprisonment in execution, survived, under which hardships no doubt occurred. All practical men, all attorneys who had been examined on the subject, had agreed in stating that the useful weapon of the law was *arrest on mesne process*, not imprisonment in execution. Mr. Ashurst, a solicitor, having great experience in cases of debt, published his pamphlet of 1838, for the express purpose of shewing the value of arrest and the evils of imprisonment :—

“As a friend,” said he, “to the abolition of imprisonment for debt, I am desirous to point out the distinction between the abolition of imprisonment for debt, and the abolition of the power to arrest.”

And again, — “Imprisonment for debt is injurious to the creditor and debtor, but the Law of Arrest, with the power of *immediately appealing to a judge* and terminating it, is advantageous, particularly to honest men without capital.”

Again, — “To suppose that creditors prefer their debtor's body to their debt, is to suppose them to prefer carrion to cash ; and if they were such cannibals, it has not been the Law of Arrest that has indulged their taste, but the non-erection of proper courts, and the non-appointment of judges with powers to deal *immediately* with the question, upon the requisition of either party, and to discharge the debtor if unable to pay, and with or without requiring the surrender of his property, if the judge saw that to be right.”

A leading article in the “Times” took the same distinction, concluding thus : “The fairest course therefore to the debtor, the course most likely to give him caution in avoiding Insolvency, and industry, and zeal in clearing it off, is also the course most beneficial to creditors, and ultimately to the State. It is, however, a course which can be pursued only through a middle line, between the harshness of the old English law, and the strange laxity introduced by the *mischievous* measure of the Government, THE SWEEPING ABOLITION OF ARREST ON MESNE PROCESS.”

The advocates of abolition still continuing to urge their

views, in 1842 and 1844, further provisions were made for the protection of debtors. By a Bankruptcy law of 1842¹, all traders were allowed to issue fiats against themselves, and by an Insolvency² law of the same year, all persons except traders owing more than 300*l.*, were enabled to obtain a temporary protection from arrest, on their own application, and a final protection unless they should appear to have been guilty of certain acts of delinquency; and by an Act of 1844³, all persons in prison for debts to any amount were to be released on petition, unless similarly guilty; and all persons in prison for debts originally under 20*l.* were to be released, and in future no person was to be imprisoned for a debt under 20*l.*

The course of legislation *against* the creditor was now complete; and had it not been for that part of the law of 1844, which put an end to all seizure of the person for debts below 20*l.*, the trading world, though they strongly felt the injustice to which they had been subjected, must have submitted, silenced by the very plausible, though very unfair reproach, "You trust too incautiously."

But the advocates of abolition had gone one step too far. Where a government wrongs only a small body, the small body must submit; it has not strength to make itself heard in the din of society. But a legislature that "touches all men's purses," very soon finds that "such is the shortest way to general curses." As long as the Abolitionists in Parliament affected by their measures the middling class of creditors only, scarcely affecting either the very high or the very low, discontent evaporated in private grumbling; but no sooner was the law of 1844 passed, and its effects discovered on creditors for debts under 20*l.*, (a class outnumbering all the others in the proportion of five to one,) than the storm began to rise; public meetings were held, the city of London setting the example; associations were formed for the protection of creditors; deputations waited upon Members of Parliament and persons in authority; and such symptoms of general dissatisfaction appeared, that in one

¹ 5 & 6 Vict. c. 116.

² The results of these laws, in one London Court, up to Dec. 1845, have been — Insolvents, 605; Assets, 2881*l.* — Average assets in each case, 4*l.* 15*s.*

³ 7 & 8 Vict. c. 96.

short year the government found itself obliged to retrace its steps, and a new law was passed, called "The Small Debts Act," substantially re-enacting imprisonment for debt in execution, and only qualifying it by directing that the imprisonment should in future be in proper prisons, and not in dog-holes, in which under the previous law prisoners under the judgment of small-debt courts had been occasionally confined.

So far we have been endeavouring to show the errors which existed in the law of debtor and creditor before the year 1831, the momentous but mischievous changes which took place in 1838 and 1839, the changes in 1842 and 1844, and the sudden retracing in 1845 of one false¹ step taken in 1844.

The Bill, to which we have referred at the head of our article, has just been presented to the House of Commons by Mr. Hawes. It is understood to emanate from a committee formed in the City, and is intended to provide remedies for the more prominent evils of the existing law. We propose to specify those evils and the remedies proposed, and to state how far those remedies are in accordance with our views.

The mischiefs proposed to be remedied are principally as follows:—

First Mischief.—No adequate means exist of forcing a trader to commit an act of bankruptcy.

Before 1838 there existed ample means in the law of arrest on mesne process. Under that law the unpaid creditor swore to his debt, issued a writ, and let the debtor know that the bailiff was after him; upon which the debtor either absconded to avoid the arrest, which was an act of bankruptcy, or he was arrested, and, if really insolvent, could not get bail, but lay in prison, and that also was an act of bankruptcy from the day of the first arrest. This proceeding was cheap, speedy, and effectual, but with the abolition of arrest on mesne process it fell to the ground. Arrest under judgment, it is true, remained; but this was comparatively useless, because it is not one honest creditor in twenty who has a

¹ This false step has been very unjustly attributed to Lord Brougham, who, however, never advocated the abolition of arrest. All that Lord Brougham ever desired was, that those who had been sent to prison *without inquiry*, under the old and unreformed law, should have their cases inquired into, and should be dealt with according to the result of that inquiry.

judgment (those who have are generally knaves), and whilst the honest creditor is getting one, the debtor has ample time to turn his property into money and withdraw himself and it from the scene,—or to distribute it amongst friends in fraudulent preferences, which every one *knows*, and no one can *prove* to be fraudulent,—or to practise a clever manœuvre, the details of which Mr. Commissioner Fane's paper very fully explains, of delaying the hostile creditor and helping on a friendly or sham creditor to speedy judgment and execution,—or to practise any other of the numerous devices known to knavish advisers of knavish debtors.

The act of 1838 and that of 1842 attempted to provide new Acts of Bankruptcy, but both are utterly inefficient against thorough knaves. We have stated the effect of the Act of 1838 above¹, and have shown its inefficiency on account of the length of time it takes to mature it into an available Act. It is, however, doubtful whether the whole provision is not repealed by the Act of 1842²; and as to the remedy³ provided by that Act, it can always be defeated by the debtor, if he have courage enough to swear that he believes he has a good defence to *some part* of the demand, for upon his so swearing, the whole proceeding falls to the ground, and the creditor pays the costs. Now, a thorough knave must be an arrant coward also, if he will not venture to take such an oath, for it is an oath on which it would be impossible to convict any man of perjury. Of course a law which is effective against honest men, and ineffective against knaves, is all but useless.

Having ascertained the inefficiency of these remedies, the City Committee now propose a remedy⁴, consisting of two parts; first, requiring the alleged debtor when summoned before the Commissioners under the law of 1842, not merely to *swear* but to *prove* that he has a *good* defence; and, secondly, on his failing to do so, and failing to give proper security for the debt, authorising the Court to send in a person to seize the debtor's property and prevent its removal, unless certain accounts are kept and rendered to him of what is done with it. To the first branch of this proposal we object, because it really requires the trial of the question

¹ p. 147.² 5 & 6 Vict. c. 122. s. 2.³ ss. 11—15.⁴ Bill ordered to be printed 8 April, 1846. ss. 10—14.

between the creditor and debtor; and if the question is to be tried *at all*, either by the old jurisdiction with a jury, or by a new jurisdiction without a jury, proper time *must* be allowed to the debtor to get up his defence and procure the attendance of his witnesses. Time must thus be lost, and the debtor will have the same opportunity as before, of making away with his property. To the second branch we object, because we think that it will be just as destructive to the debtor as the common seizure under the law, and less efficacious for the creditor.

The fact is, the City Committee are pursuing a wrong path. All careful reflection and all experience point to the conclusion advocated in the pamphlet of Mr. Fane, and in that of Mr. Ashurst, and sanctioned by sixty-four out of eighty persons, who gave evidence under the Bankruptcy Commission of 1840, namely, that it was an error, *abolishing* arrest on mesne process, instead of *guarding it against abuse*, as might have been done, most easily and most successfully. Seizure of the person is less expensive to both parties, not a bit more injurious to the debtor, than seizure of his stock in trade, and more effective for the creditor. Of course, under proper regulations, it would not take place, unless there was sufficient evidence to convince a Court that the debtor had absconded, or was about to do so. In the absence of such evidence, the first process would be summons. The existing law is as unjust as the old law was, though in different ways.

Formerly the creditor's oath was conclusive, and upon his affidavit, however false, the debtor was arrested; now the debtor's oath is conclusive, and upon his affidavit, however false, the creditor's proceeding falls to the ground, and the creditor pays the costs. Which is the greater absurdity? which the greater injustice? We should say, the modern one; for as a general rule, it is safer to trust creditors' oaths than debtors' oaths. We are against trusting either implicitly. We are for enquiry by a Court; such enquiry as takes place daily in Chancery upon *ex parte* motions for Injunctions, but with the additional precaution of requiring the Court to call for the plaintiff's books and papers.

Another injustice is, that a debtor may have given ample security, even on freehold lands, to the creditor, and yet the

creditor may swear to the debt; the debtor cannot deny it; and then it becomes the duty of the Court to call for bail; and if bail is not given in twenty-one days for this already secured debt, the debtor may be made bankrupt. Is this justice? Is a law, that will admit of such oppression, a just law?

Another injustice is, that debtors' friends must be bail, not only for the debt, but for twice the amount to cover costs. One would think the object was to terrify friends from becoming bail, by involving them in uncertain liabilities.

Our opinion is, that neither writ nor summons should be issued against a debtor, except at the discretion of a commissioner, and that a commissioner should never issue either one or the other, unless the creditor's case appeared a *reasonably clear one*. A law framed on these principles would afford ample protection to the creditor; for he can always have a clear case, if he conducts his business as he ought to do; and it would prevent any oppression of the debtor.

But it is vain to argue for arrest, however guarded. We must swim with the stream. The tide has not yet turned. Doubtless it will turn; but as yet it is flowing strongly against us. The world will have it, that imprisonment does not pay debts, and is cruel; and it does not condescend to observe, that though actual imprisonment certainly does not pay debts, the *fear* of it prevents debts being improperly incurred; ensures payment, when debtors can pay and will not; makes traders meet their creditors fairly, and surrender something before all is gone; and, at all events, furnishes means of punishing them, if, in defiance of all fairness, they pursue an opposite course. Process against property, except in bankruptcy, is a mere delusion; for, though debtors cannot, Proteus-like, change their persons, they can slip their property, like the pea, under whatever thimble they like. The world will discover this at last; and Mr. Fane's paper will go far to help them. In the mean while error must have its swing.

Second Mischief.—The second great evil is the facility which the Law now affords to debtors, of actively or passively denuding themselves of the little property which remains at the expiration of their trading struggles; actively, by handing it over to a friend, or, passively, by submitting

to its seizure by a friend under the sanction of the Law. A knavish debtor always wishes to break with nothing, because, if there are no assets, there will be no enquiry. No one can enquire, but a petitioning creditor or assignee, and no one will accept those offices where there are no assets to indemnify them against expenses. Absence of funds therefore affords the best security to the debtor that the bankruptcy will pass *sub silentio*, or, in the vernacular, in a snug and quiet way. Even under the old Law the debtor often succeeded in breaking without assets, notwithstanding the Law of relation to the Act of Bankruptcy, as qualified by the two-months' limitation; but under the Law of 1839 the knavish debtor now always breaks with nothing. You cannot force him to commit an act of bankruptcy; and, if he has not committed one, or, even if he has, still, if you cannot trace notice of it to the friendly or the sham creditor, which you never can, Mr. Friendly or Mr. Sham gets the property quite safe, though conveyed to or seized by him only two or three days before the date of the fiat.

Convinced by sad experience of the reality of this mischief, the City Committee propose a remedy to be found in the twenty-fifth and following sections of the proposed bill, which remedy is, that bills of sale, assignments, &c. shall be *registered*. To this also we object, as utterly insufficient to meet the evil. We consider that all transfers of moveable property, whether by bill of sale or assignment, or under colour of seizure under execution, *not accompanied by an actual removal of the moveables from the premises of the debtor two clear months before the bankruptcy*, should be void against the general body of creditors. In nine cases out of ten such transfers are covers for fraud, and in the tenth case the honest one, they are very unjust, because the transferee permits the debtor to retain the outward and visible symbol of property, the possession and use of it, to delude others into trusting him, and then, at the critical moment, the moment of insolvency, he steps in and says to the other creditors, "True it is, you were deluded into thinking your debtor a man of some property; true it is, I was a party to the creating of that delusion; nevertheless, I, who helped to create the delusion, and who ought therefore more than any other cre-

ditor to be the sufferer, I will not be a sufferer, and you shall all be sufferers." We cannot see the propriety of this, even in the tenth case, the honest case; but in the nine cases of knavery, the result is of a most revolting nature. Mr. Friendly or Mr. Sham, the gentleman armed with the bill of sale or warrant of attorney, is the father or the brother, or the father-in-law or the brother-in-law, or he is the pothouse companion of the debtor; Mr. Friendly or Mr. Sham and the debtor are co-conspirators, though it is impossible to prove the conspiracy (for how is it possible to prove by *witnesses* what no one *witnessed*?) very often they were the very persons who first set the debtor up in business, and supported him by the mercantile device, called *flying kites*, that is, drawing and accepting accommodation bills, as long as he could succeed in deluding victims; and then, when the bubble is about to burst, they rush in, seize all, silence creditors by letting them see that there will be nothing to pay for enquiring; and as soon as the storm has blown over they set up the knave again, and proceed to accomplish the ruin of another set of creditors in the same way, the Law still protecting them in their knaveries.

The remedy for all this is not Registration. It is the enacting, that no transfer of goods, whether by bill of sale or otherwise, and no seizure under a *fi. fa.* be valid, unless such transfer or seizure shall have been followed by an actual removal of the property from the premises of the debtor two calendar months before the date of the fiat; with a provision, that, where such transfer or seizure shall have taken place *bonâ fide* within the two months, the person claiming under it shall have a lien on the property for any expenses properly incurred in taking possession of, and realizing it. Such an enactment would be A RETRACING OF THE FALSE STEP, TAKEN IN 1839, and improving the old law by making the two-months' limitation an absolute one, without regard to the very unjust relation to a *secret* act of bankruptcy; and providing against a hardship, which now and then occurred, though very rarely, under the old law: which was, that a creditor who had seized honestly and realized, was not only deprived of the fruits of his seizure, by relation to a *secret* act of bankruptcy, but

was left to pay all the costs he had fairly incurred. Registration is an unsatisfactory remedy, because it would not protect creditors unless they were constantly searching; and even then it would not protect a creditor who had parted with his goods prior to the date of the bill of sale. Besides, the bill of sale might be executed five days before the fiat, registered the next day, and acted on, the next.

"But then," say the advocates for Bills of Sale, &c., "if you destroy the validity of such instruments you will make it scarcely possible for a trader in temporary difficulties to get a loan." To this we reply, such loans ought to be made by lenders of money upon confidence founded on knowledge of character, — inquiry into circumstances, — inspection of books, &c., &c., duties which the law may well throw upon those who choose to lend money; but which it is unreasonable to throw on manufacturers, whose time must be devoted to their manufacture; on wholesale traders, whose time must be devoted to selecting proper stock to supply retail traders, and selling it; and on other persons having their time fully employed in the details of their business. There are two reasons why the law may reasonably throw the duty of making special enquiry on those who lend money: one is, that it is really the principal business of a money lender to enquire into probabilities of solvency; and another is, that he who asks a loan of money naturally expects and cannot resist an enquiry into circumstances, inspection of books, &c. Indeed, in our opinion, there is no class of the mercantile community that less deserves any special protection than those money lenders, who, by loans on property left in the custody of traders, help to enable them to keep up delusion to the last moment before public bankruptcy. At all events it is most unjust to allow any one creditor to leave his debtor in possession of his goods, and thus enable him to appear to the world to be a man of some property, and then suddenly seize every thing, obtain for himself twenty shillings in the pound, and leave for the rest little or nothing — not even the wherewithal to pay the expense of enquiry.

Third Mischief. — A third great evil is, that the withholding of the certificate is really no punishment at all to a knave: as soon as the storm has partially subsided he uses

the property he has secreted to commence a ready-money business. It is soon forgotten that he was ever bankrupt. He establishes a character for punctuality in a year or two, by paying with regularity; which, by a judicious use of what he has *secreted*, he can easily do. He seeks out manufacturers and wholesale dealers who have never heard of him before, gives them a reference, perhaps to a confederate, perhaps to a person who, having been paid with regularity, has not a bad opinion of him; he soon drives a flourishing trade, lives as before, extravagantly, and, as before, becomes bankrupt again. It may be said, — “Oh! but an uncertificated bankrupt cannot hold property: the assignees under his bankruptcy can seize it at any moment.” This is quite true; but there are many things that *can be* done which never *are done*, and this is one of them. Sometimes the knave changes his name, and that baffles enquiry; but the common case is that he does not change his name; there is no occasion for it; he sets up again, deals with new victims, and no one interferes.

But it will be said, “Why don’t the assignees interfere? why don’t they seize?” The answer is plain; the assets under the bankruptcy have long since been divided, and they have not the sinews of war; the bankrupt may have been so great a knave, that there never were any sinews of war; but, even if he broke with something, what remains, after expenses paid, is in due time divided, and the assignees have nothing in hand. In such a state of affairs, why should assignees stir? there is always danger in attacking a knave: he is a skilful fencer, quite an artist in his way; he knows how to parry an attack with some piece of knavery, a bill of sale, or a judgment and execution, and so forth; so the assignee attacks at some peril, and why should he incur any peril at all? If he succeeds, who gets the benefit? the assignee? No, — he must distribute the assets recovered amongst the creditors; and his share, as a creditor, will probably be very small, and quite inadequate to the risk; but if he fails? ah! that is an ugly alternative! there are such things as damages! and what is worse, costs! costs on both sides! all indefinite sums! all falling upon himself! “*omne ignotum pro magnifico* ;” — these perils, under the influence of

imagination, assume terrific shapes, and Mr. Assignee thinks within himself, that "the better part of valour is discretion;" he declines the conflict, and the knave enjoys, what he has secreted, in perfect security.

Unfortunately, the only person who can by law interfere with the bankrupt is the assignee, and if he will not stir, the knave is safe. This was not so from the time of Henry VIII., when the first bankrupt law passed, till 1809.

Harry the 8th's law provided, that if the creditors did not get payment in full, they should have all their old remedies. Queen Elizabeth's law did the same, and so the law continued till 1809; but in 1809 it was provided, that no creditor should be allowed to prove or claim in bankruptcy without abandoning any proceedings he might be prosecuting at law, and that his proving or claiming should operate as an abandonment of all right to enforce his legal remedies; and so the law has continued to this day.

Both these systems appear to us to have been unreasonable. They were the extremes. Harry the 8th's law was unjustly severe, and even cruel; the law of 1809 not stringent enough: the true policy would be to take a middle course, to protect the bankrupt from all proceedings by individual creditors, whether they proved or not, *pending* the inquiry, and so long as the Court considered, that the bankrupt was forwarding the administration of his estate to the best of his power, and to protect him also *after* the inquiry, if the Court thought there was nothing in his conduct calling for punishment; but, on the other hand, if during the inquiry the Court thought the bankrupt was trifling with his creditors and the Court, or if at the end of the inquiry the Court thought that the bankrupt had concealed property, or for any other reason deserved punishment, their protection should be withdrawn, and Harry the VIIIth's law should apply; and not only this, but all creditors who have proved should be advanced to the position of judgment creditors; and, as such, should have power to seize the person of the bankrupt, and throw him into prison (with power, however, to the commissioner to release him after sufficient punishment), or to seize any property they could find not seized by the assignees, *each at his own risk and for his own profit*; and to facilitate seizure of the

property, it should be enacted, that all property in the order and disposition of an unprotected bankrupt, with the acquiescence of the true owner, should be liable to such seizure; thus applying the well-known doctrine of reputed ownership in a new, and, as we think, a better way. Under such a system the reasonably honest debtor would be sure of ample protection, for Courts always err on the side of mercy; and the really dishonest could scarcely ever escape punishment. Another excellent effect would be, that debtors would probably cease to conceal their property; for, of what use would it be to conceal property, when every creditor had become a judgment creditor, and had power to seize such property the moment the knavish debtor brought it from its place of concealment, and began to use and enjoy it?

The proposed bill contains clauses which, though framed in accordance with these views, would only carry them out partially; because the proposed enactment would only enable the creditors to seize the *person* of the unprotected bankrupt, whilst the most important object is the seizure of his *concealed property*, the moment it emerges from its place of concealment. It may, perhaps, be said, that seizure of the property by the individual creditor for his own benefit, is inconsistent with the general tenor of the bankrupt law, which is founded on the principle of equal distribution; but to this the answer is, that when property has been concealed, nothing but individual vigilance, stimulated by individual motives, will ever occasion its discovery and seizure; and we must not forget, that the effect of such a law will be, not so much to enable individual creditors to seize concealed property, as to prevent concealments altogether, by making them useless, and thus ensuring an equal distribution, in the vast majority of cases. We are convinced, that clauses framed on these principles, would produce a very sudden change for the better in the conduct of debtors.

Fourth Mischief.— Another considerable evil in the old law was, that the surrender of the bankrupt entitled him to exemption from arrest¹, for at least forty-two days, and this whether the bankrupt was doing his duty during that time or

¹ 6 G. 4. c. 16. s. 117.

not. The same mistake was committed in Insolvency. By the law of 1842¹, all process was to be stayed till "the appearance of the petitioner in court. Now the best guarantee that the Court can have, that a debtor will do his duty, is his liability to arrest, if he does not. It is obvious, therefore, that the true policy would have been, to have enabled the Court to protect the debtor, so as to prevent individual creditors from thwarting him in his object of meeting his creditors, and explaining his conduct, and, on the other hand, to have enabled the Court to withdraw its protection the moment it saw that the debtor was not acting in good faith. The City Committee propose very properly to give the Commissioner the power of withdrawing his protection in all cases, and at any moment, at his discretion. Debtors will then find it worth their while to endeavour diligently to satisfy the Court and their creditors.

Fifth Mischief.—A minor evil, originating in the law of 1844, which authorized traders to issue fiats against themselves, is, that in such cases the debtor has the nomination of the solicitor to the fiat. Now the solicitor is, according to the theory of the law, clerk to the fiat; that is, he is the agent for *all* the creditors, and it is his duty to give them all proper assistance. Under the old law, the petitioning creditor named the solicitor first, and afterwards the assignees; in either case the nomination proceeded from creditors; and under such a nomination one might reasonably expect, that the solicitor would do his duty to the creditors, and give them all fair assistance; but under this new law, the nomination proceeds, not from creditors, but from the debtor, which is absurd. What reasonable ground is there for supposing that the *debtor's* solicitor will help the creditors? For this mischief the City Committee propose to provide, by vesting the nomination of the solicitor to all fiats, issued by the debtor, in the Court. This, we conceive, will be a very useful provision.

We will now conclude. We are well aware that we have left unsaid a vast deal that ought to be said; but our limits warn us to stop. We hope, however, at an early opportunity to resume the subject, and to continue

¹ 5 & 6 Vict. c. 116, s. 1.

its discussion from time to time, till the true principles are fully recognised and boldly acted on. We do not despair even of seeing a Code of Bankrupt Law. The Bankruptcy and Insolvency Law of England is now a mass of confusion. There is also the Irish, the Scotch, and the Indian Bankrupt Law. All the Acts ought to be examined and reduced by competent persons, employed by the Government, into one consistent whole. This would be a great boon to the country. There cannot be a better subject for a Code, for nearly the whole law is statute law.

ART. XI.—BURDENS ON LAND—CONVEYANCING REFORM.¹

THE subject of the Burdens on Land has been for some years an annual dish served up to Parliament. Recent events have given a fresh appetite for its discussion; and at length a committee has been nominated by the House of Lords for its consideration. We are not about to invite our readers to a *réchauffée* of the debate on the Corn-laws, nor to plunge them into a discussion on tithes, poor rate, and highway rate. These are subjects which are hardly within our province. We hope to be able, in some future number, to lay before them some account of the operation of the new law as to commutation of tithes, one of those statutory changes which will hereafter have an important influence on the law of property in this country. But we may dismiss it for the present, and pass on to some burdens which have not been so generally adverted to, in the annual debates on the subject, but as to which no doubt exists; and which further, as we hope, may be greatly alleviated. First, let us state our grievance.

¹ We have great pleasure in directing the attention of the reader to an interesting article on the transfer of real property in the last Westminster Review, No. XLV. art. 5. We are desirous, however, of stating that the greater part of the above article was written before we had seen our contemporary's. If, then, there be any similarity in the views taken, it strengthens the case, as it shows that different persons, without communicating, have arrived at the same conclusions.

On the day on which this article is written, 100*l.* three per cent. consolidated Bank Annuities may be purchased for 96*l.*; and, on the same day, the French three per cents rentes are quoted in London at eighty-three francs; and the Belgian funds are pretty nearly the same price. The difference in price is here easily to be explained in the superior stability, and consequent superior credit of this country, as compared with France or Belgium. In purchasing almost all other things, moreover, 100*l.* will go much farther in France and Belgium than in England. There is, however, one remarkable exception, and that is, *land*. In Belgium, it is not unusual to give as much as fifty years' purchase, and very usual in France to give forty-five years' purchase; whereas in England thirty years' purchase is a high rate, and twenty-seven years, or even less, is frequently taken.¹ Of this, we believe, there can be no doubt; and yet in England there is *more* stock or funded property, and *less* land than in France; the land is also more thickly inhabited; and it might be thence reasonably inferred that there would be a better market for it, greater competition, and higher prices; and yet the reverse is the case.² These facts then appear to us so strange, that we shall endeavour to account for them; and in doing this, we think we shall be able to render no mean service to a class which is now more or less in a state of some alarm—the owners of land in this country.

How then is the low price of land to be accounted for? We have not the smallest hesitation in saying that it arises mainly from—1. The present state of the law as to the tenure of land; 2. The length, expense, and delay attending abstracts of title and deeds; and, 3. The stamp duties on the transfer of land. We shall offer some remarks on each of these heads. But first there are one or two points which

¹ We have heard in several recent Chancery sales of land going as low as twenty-four years' purchase.

² We have been furnished with the following statement as to the comparative values of land:—In Belgium land is worth about fifty years' purchase; in France, forty-five, or thereabouts; in Switzerland, forty; in many parts of Europe from thirty-five to forty; in Scotland (when not too large masses are thrown into the market), from thirty to thirty-five; and in England from twenty-seven to thirty. This, we understand, is borne out by the evidence taken by the Committee on the Burdens of Land.

we would wish to settle. We think it will be universally admitted, that every thing which checks the free alienation of land is an evil. The rapid change in the ownership of land is not a thing to be wished in itself, but the owner should be able to aliene it as freely as possible, if he wishes to do so. He should not have on his hands a commodity which he cannot easily render available for his purposes; and if the state of the law in any way prevents him from doing this, it should, if possible, be altered. Again, it is for the interest of all parties in a state, more especially to encourage a large class of *consumers* of land: to increase the number of persons who have a stake in the country has always been the endeavour of every wise government; and there can be no better way to do this than to increase small holdings in land: we need not add that it is also greatly for the interest of the owners of land to do this; for, of course, it increases their market, and raises the price of the commodity which they have to sell. It will be our object to show that the law is defective in these particulars — that it discourages the ready conversion of land, and the rapid change of ownership, which is unavoidable in a commercial country; and that it limits the class of dealers in land within a very narrow circle.

I. First, then, as to *tenure*. — This is of ancient origin, and the inconvenience which attends it would perhaps be best illustrated by considering the different rules which govern the transfer of real and personal property.

Let us first take personal property, excluding of course that part of it which is called *real chattels*. Say, that I am desirous of investing 1000*l.* in money at my bankers' in any kind of personal property. I may enter a shop and lay it out in plate or diamonds, or furniture; and on drawing my cheque for the value, I become the undoubted owner of these chattels, of which if I please I may immediately possess myself, and may the next minute give or dispose of them to another. But all these chattels in their very nature can be so dealt with. To use the phraseology of the civilians still preserved in the Scotch Law, they are things *moveable*, and there is no distinction between jewels and cotton, or oil or

¹ We are only now stating the practical operation of the law without entering into the question of sale in market overt.

cern, except that if the 1000*l.* be laid out in these, the produce cannot so easily be moved. There is no difficulty as to the title; one hundred tons of oil, one thousand bales of cotton, one million quarters of wheat may be transferred without any inquiry as to title. By the Statute of Frauds, 29 Car. 2. c. 3. s. 17., when the goods amount to the value of 10*l.* or more, there must be a note in writing, unless the buyer actually receives part of the goods sold by way of earnest. But for the purpose of the sale, all that is wanted is some evidence of the ownership. In transfers of goods lying in the docks, the transfer of the dock warrants is a complete transfer of possession, and the possession of them a complete evidence of ownership.¹ Goods in a warehouse are generally transferred by notices to the warehouse keeper.² Goods to any amount may thus be transferred, and each person to whom they are transferred becomes the absolute owner of them. In the course of a day a dozen transfers may and do frequently take place.

But we have hitherto been speaking of goods of a moveable nature, which are usually intended to be resold: we now come to stock in the public funds, or in public companies, in which permanent investments are made. The value of their stock depends on the credit of the government or company whose stock it is; but in laying out my 1000*l.* no investigation of title is necessary, and no difficulty exists in negotiating the transfer. In certain foreign government securities, as for example, the Dutch, on signing my cheque I receive in exchange on the spot, without any writing whatever, certain printed bonds of a particular amount, annexed to which are half-yearly certificates or *coupons*, which entitle me to receive the stipulated interest. But in buying English stock, a little more trouble is necessary, as the person from whom I purchase is obliged to sign a printed transfer of the amount to me; but this is the whole ceremony. Whenever I lay out my 1000*l.* or 1,000,000*l.* in stock, of this I become the absolute owner, and may transfer it in the same manner to any one that I please. These transactions being so simple, it follows that hundreds of them are transacted every day; and

¹ Lucas v. Dorrein, 1 J. B. Moo. 29. Greening v. Clarke, 4 B. & C. 316.

² Knowles v. Hoesfale, 5 B. & A. 134. Storer v. Hunter, 3 B. & C. 368.

although the fee for effecting this transfer is a very small one, many hundreds of respectable persons maintain themselves on them, not only in London, but in all large towns. It is a very thriving business. Some of the richest individuals in this country belong to this class. They are called *stock-brokers*, and it is found necessary to have a large building exclusively appropriated to these transactions which is called the *Stock Exchange*.

These are, indeed, very familiar matters ; but we are obliged to mention them because we are now going to contrast with them the mode of alienating *real* or *immoveable* property ; for we may consider funded property as of the *moveable* class. But first let us observe that a large amount of real property is already transferred in the simple and expeditious manner to which we have referred. Shares in most public companies are made personal estate by the act which constitutes them, and this for the very purpose of being so transferred : and thus it happens that in Railroad Companies, Mining Companies, Canal Companies, and others, interests in land are transferred in the manner of which we speak. No investigation of title is necessary, although in some cases the mode of transfer is more formal. This is pretty good evidence, not only in which way public opinion leans, but that there is nothing in the nature of land which prevents its being so transferred. It also shews the desire which exists to withdraw real estate so far as it is possible, from the operation of the peculiar laws of property applicable to it. It is also to be remembered that the dealings to which we advert have lately far exceeded, both in number and value, all other dealings in land.

Where, however, there is no express Act of Parliament for the purpose, the common law obtains ; and now we shall inquire in what manner, by this law, my 1000*l.* may be laid out. We assume that there is a desire to make a permanent investment, and not a loan by mortgage, (to which we shall hereafter advert,) that an eligible purchaser has been found, and that all parties are willing to complete it. Here, then, first steps in the law of *tenure*. Is the land freehold or copyhold, is the first question ?

First, we will say, it is *freehold*. And what is the tenure

of freeholds? There can be no *absolute* ownership of freeholds; that is the first distinction between real and personal property. No land can be enjoyed *allodially*. It is *held* of some superior *lord*—generally the Crown. But why is this, and what is a *holding*? and what is a *lord*? These terms owe their origin to the feudal system; and the rules are thus shortly described by a recent writer:¹—“Every manor presented a little society of warriors and husbandmen, combined for mutual defence and support: as such a league naturally required that a new and perhaps unfriendly associate should not be introduced without the privity of the lord and his existing tenants, livery or the transfer of the feud was a solemn installation witnessed and sanctioned by the federal body.” This is all true: but what have I to do with this? The feudal system no longer exists in this country. No; but its rules still govern the alienation of land. The feudal maxim is this:—“The tenancy of the freehold must always be free, in order that there may be a person, seized of the freehold, to perform services to the lord, and to be answerable to actions of persons having claims to the land.”² There is a perpetual ideal *seisin* of the land by a tenant, which must not be for an instant disturbed. There was at one time a person ready to do battle if necessary; but subsequently, to perform service, and to be answerable to actions. But now, all this is a mere fiction; there is no person on the land for any of these purposes: but still the rules of the common law all proceed on this supposition: neither is this state of the law a mere theoretical evil; it is attended with considerable practical hardship.³

Perhaps not the least of these hardships is, that this common law is carried to many of our largest colonial possessions, former or present. These absurdities of the feudal system govern the tenure of land in many parts of North America, of India, and in the whole of Australia. William the Conqueror little knew how far, or to what extent, he was perpetuating the Law of Feuds when he or his advisers

¹ 1 Hayes, Convey. 29. Ed. 5.

² Third R. P. Rep.

³ This is well shown in the first Report of the Society for Promoting the Amendment of the Law relating to Uses and Trusts, to which we have been indebted in this article.

introduced them into this island. The limitations in every deed must now be construed with reference to three distinct systems of Law—the common Law, the Law arising out of the Statute of Uses; and the Law of Trusts in Chancery. A limitation, which fails at common Law, may take effect as a use, and a limitation that fails, as a use, may take effect as a trust. But it is surely no small source of difficulty that three different and conflicting systems of Law prevail in this country, by which the most simple conveyance must be construed.

Here, then, we have a source of technical difficulty which ought to be removed. But this is a minor grievance, compared with what remains. In personal property, as we have seen, no inquiry is made at all into title. How is it with real estate?

In spite of some conflict of opinion on the subject, a title of sixty years must still be produced.¹ This last Statute of Limitations has made no alteration of the Law in this respect; nor has the act relating to outstanding terms, although it has relieved the title to lands from much subsequent expense, difficulty and delay, relieved the abstract from any of its bulk. We apprehend that the deeds relating to all terms must still be abstracted, as it will be necessary to show that they have in fact become “satisfied” within the terms of the act. Now this required length of abstract is a most serious burden on land. This abstract must be made out, whether the land be incumbered or unincumbered, whether the land consist of one acre or 10,000 acres: and what, after all, does it show? what title is given, after all? what security has the purchaser after all his trouble and expense, that he has a good title? Alas! but little: he only at best buys a probability. We say nothing now of suppressed deeds, which may entirely defeat him. But say, that every deed relating to the land for sixty years is fairly abstracted; the apparent possession may turn out, however secure on paper, utterly valueless, as being founded on a life estate. False recitals, false deeds,

¹ *Cooper v. Emery*, 1 Phil. 388. See also *Cottrell v. Watkins*, 1 Beav. 361.; 2 Sug. V. & P. 132. The last learned writer considered in the first instance, that a forty years' title would be sufficient; but this opinion has been overruled by the practice of the profession.

false pedigrees, may all have been resorted to, and a remainder-man may defeat the whole. If it be said that this rarely occurs, we have to say in reply, that in the main, men are fair and honest in their dealings, and that in these cases no inquiry whatever may be necessary. But the cases to which we refer have occurred; and there is now a cause before the Court of Chancery which, either through ignorance or design, we know not, fully illustrates our position. Now, it appears to us that if we are to have an expensive investigation of title, we should have certainty. The present practice, indeed, appears to us beset with absurdity. Almost all the delay and expense that occur arise from imperfect attempts to arrive at a certainty, which really, from the nature of things, cannot exist. Certain conventional questions are asked, and certain requirements made in every case alike, and thus all examinations of title become burdensome, and are thus, in dealings with small properties, sometimes entirely abandoned. *Le jeu ne vaut pas la chandelle.*

The attempt, as has been observed, is not to show the title to the present piece of land which is to be conveyed or dealt with, but to a piece of land which existed sixty years ago, and the abstract of title is the history of the events which have occurred since that period. Thus the land to be sold was frequently part of a much larger piece of land; and the abstract is then swelled with many matters which relate to other parcels. Again, the land has been built on or utterly changed in its nature and description; and, although fortified by affidavits of identity, is to be taken mainly on *trust*.

These inquiries, however, would all be endurable if an indefeasible title were acquired. But we all know that this is not the case. And can we wonder that all this delay and expense lower the value of land in this country? Do we not begin to see the reason that funded property, although liable to depreciation, and even annihilation, or 'repudiation,' sells for thirty-two years' purchase; and land, although imperishable, and susceptible, under particular circumstances, of great improvement, and being, under all circumstances, of great intrinsic value, yet only sells for twenty-seven years? In the one case the gain may be small; but the expense attending the acquisition is limited and certain. In the other

case it is very heavy, and, what is worse, very uncertain. If I lay out my 100*l.* in land, I shall have to pay, probably, 30*l.* more for the expense of my purchase, and, perhaps, 500*l.* more to defend it, and I may lose it after all. For my 100*l.* consols I pay only 2*s.* 6*d.* to the broker; and if I lose my purchase altogether this is the worst that can happen. It is no wonder, then, that many go into the Stock Exchange, and few go into the Auction Mart. It is no wonder that a man, having a small sum to invest, except under peculiar circumstances, never dreams of investing it in land. The present state of the law as to title effectually excludes from the market the classes who are the great consumers of every other commodity, — the middle and lower classes, who never, as a class, venture to buy land. And yet this does not proceed from any indisposition to the investment of their capital in land. We know that there are few large capitalists who do not hasten to make purchases in land with all its disadvantages. The same desire is felt by the tradesman, the merchant, the lawyer: but they shrink from gratifying it, from the uncertainty and expense. They cannot afford the risk. Still these classes, to a great extent, go as far as they safely can: they buy long leases of their houses; for here it is to be remembered the title of the lessor is usually not inspected: they shut their eyes to the danger, and thus it is that leaseholds are comparatively at a high value in this country. Surely the same persons who now buy long leaseholds would buy the fee-simple, if they could do so as easily. An unwillingness may exist, we admit, to part with the fee-simple; but this must in most cases be overcome by the offer of an adequate price, which, for the reasons which we have mentioned, is rarely offered.

We have been hitherto speaking of freehold tenure and title. We shall now proceed to copyholds; and here we find the evils of tenure considerably increased. When some parts of this tenure are deliberately considered, we can hardly believe that it has been suffered to exist so long. We will grant that there is usually a greater simplicity of title and of transfer than in freeholds, and that for this reason there are many smaller copyhold than freehold holdings. But when we say this, we have to observe, that the same simplicity

of title and of transfer should be extended to freeholds. In all other respects the tenure of copyholds is far inferior to that of freeholds, and that, in many cases, it is exceedingly oppressive.

This may perhaps be shown most clearly by supposing that a piece of freehold land was in a night changed into copyhold. The owner when he woke up would be told of the transmutation of his property: and he would inquire how he was affected by it. He would find that while he enjoyed his freehold *usque ad cælum*, and down to the centre of the earth, that in his copyhold he could not dig for any mineral or cut down a tree; he would find that if he pulled down a hovel or dug for clay, he would be liable for forfeiture for waste; that if he improved his new possession, either by building, agriculture, horticulture, or in any other way, he would be liable to pay a two years' fine on his improvements to the lord, on his death, or on the alienation of his property; in many manors half of this on mortgaging his land, and in some manors a two year's further fine on the death of the lord: he would further discover that on his death, and sometimes on alienation, his best beast or chattel might be seized as a heriot. We admit that here we are only describing the worst kind of copyholds. But in all there is this disadvantage that the land is governed, not by the established rules of law, but by the custom of the particular manor, which custom can only be found in the Court Rolls. He would find also that the expounder of this custom was the steward who had the custody of the Court Rolls; that he was also subject to the demands of such steward for fees, which differed from the regular charges for freeholds; that whereas, on acquiring freeholds by descent he was subject to no claim whatever, in copyholds he was liable to fees for admission; and that for whatever causes these fees were demanded, they were not subject to taxation (although all other conveyancing charges might be taxed), and could only be resisted by defending an action at law: neither would it add to his joy on his new accession to find that for every separate tenement a separate fee must be paid. But we have no wish to argue conceded points. The copyhold tenure is doomed—it is already in its last agonies; and whether it is allowed to expire by a wasting

and lingering death, or shall be terminated by a sudden blow, is a matter perhaps not of much consequence. We were extremely glad, therefore, to see that on the 6th of March last Sir Robert Peel declared in Parliament that the time had come when heriots might be safely and properly abolished; and we have reason to suppose that the session will not be allowed to close without the introduction of a Bill for that purpose.¹

We propose, on some future occasion, to call attention to the working of the Copyhold Act. We may now state the particulars of one enfranchisement under it which has come to our knowledge, and which will show at once the advantages to be derived from enfranchisement, although the circumstances were here of a peculiar nature. In the manor of Knightsbridge, a small grass field containing 4 A. 1 R. 5 P., which would let as such at about 30*l.* per annum, abuts upon the road which runs along Hyde Park. The copyhold incidents were arbitrary fines; the land was not heriotable, and the only other burden was a small quit-rent. This piece of land was, however, available for building purposes; and the value of the enfranchisement was on this account fixed at 4500*l.*, or 150 years' purchase. Since it was enfranchised, contracts have been entered into to build houses upon the land to the value of 100,000*l.* This, doubtless, is a highly favourable instance of the benefits to be derived by all parties from enfranchisement. Still we believe that other circumstances as striking may be produced; and we have not the slightest doubt that the absence of enfranchisement impedes improvement to a greater extent in many cases even than in the Knightsbridge case. It is certainly a matter of surprise, that a grievance so long and so generally complained of, yet remains unredressed.

While we are thus disposed to condemn in the strongest manner the tenure of copyhold, we are bound to say that the *title* to copyhold lands is generally much shorter and more simple than that of freeholds; and that although this does not counterbalance the disadvantages of the tenure, it points to the nature of the relief which may be extended to freehold

¹ We have already referred to the grievance of heriots at length. See 2 L. R. 263.

titles. This consists mainly in a well-considered scheme of Registry, which would obviate most of the difficulties which we have pointed out. On the present occasion, we can only indicate this as the real remedy. We hope very speedily to be able to enter into details.

II. The second great burden upon land to which we would advert is the unnecessary length of deeds: but this subject is already familiar to our readers, and we need not now say much upon it. In some transactions the deed may be saved altogether. This has been done in the two late cases of the abolition of the lease for a year, and in the act dispensing with the assignment of terms. By the Charitable Trusts Bill now before the House of Lords, it is proposed to enact that the lands belonging to the charity shall vest in the trustees appointed, without any conveyance for that purpose: and there are many other cases in which the same course may be safely adopted. But where a deed is necessary, it may be materially shortened and otherwise simplified by acts similar to that which were passed in the last session of parliament with respect to the forms of purchase deeds, and leases in towns; and more especially by extending them to mortgages, farm-leases, and settlements,—and even wills may be reached by similar provisions.

We are not a little rejoiced, therefore, to find that a comprehensive measure was brought in by Lord Brougham (March 27.) before Easter, having this object in view, and we cannot serve this cause better than by recording what took place on that occasion.

LORD BROUGHAM said, he held in his hand a bill, which he moved be then read a first time, the second reading to be taken after the holidays, the object of which was to redeem the pledge he had given on a former occasion, that the wholesome and salutary provisions of the bill of last session for simplifying the conveyance and sale of landed property should be further extended to leases. The bill contained formula which would prove a great comfort to those who were interested in the subject, and perhaps a great discomfort to certain practitioners of the law; but for that he did not care; he looked to the interest of the client, not the solicitor,—to the courts, whose time would be spared, and to the client, whose purse would be saved. It was proposed to extend the provisions of the bill that applied only to the conveyance and

sale of lands to mortgages, settlements, both of realty and personalty, to wills and farm leases. The expense of conveyances was one of the greatest inconveniences landed proprietors were subjected to. The Committee on the Exclusive Burdens upon Real Property had collected evidence on this subject which was quite frightful. There was a reluctance among some of the profession to use these forms, because they were not compulsory. He had been asked why they were not made compulsory: — it could not be done. If practitioners chose to convey a piece of land by a long, rigmale, and expensive deed, they could not compel them to use a shorter form. But he had introduced a clause in the present bill which he hoped would have this effect. In taxing costs it authorised the taxing master to take the circumstances into consideration, and to disallow the long form, if he should be clearly of opinion that the shorter and simpler form would have sufficed.

Lord CAMPBELL expressed his concurrence with the measure proposed by the noble and learned Lord, but regretted that he should have cast the reflection he had done on the legal profession.

Lord BROUGHAM by no means intended a reflection on the profession in general; he had said only certain practitioners, solicitors, and others were opposed to the measure; he believed that the greater number of intelligent men of the profession were in favour of it.

Lord BEAUMONT congratulated those interested in real property on the question having been taken up by so high an authority as the noble and learned Lord. The evidence taken before the Committee upon the Local Burdens on Land proved that the transfer of property was impeded by the present system, and the investment of capital in land lessened.

The bill was read a first time.

At the time at which this is written, the Bill has not been delivered to the House of Lords, and from the length and importance of its provisions, we are not surprised at this. There can be no wish on the part of the promoters of the measure unduly to hurry it through parliament. But while on the one hand we would entreat Lord Brougham to listen to all fair and candid objections, we would hope that his lordship will pay no attention whatever to any attempt to defeat the bill which takes the form of asking for time. Whenever no specific objection can be made, we hear such idle words bandied as these: "Why all this hurry? why was not this Bill brought in at an earlier period? Away with these

crude reforms; if we are to have these Bills, let us have full opportunity to consider them," &c. &c. These vague objections are merely taken for the purpose of delay, and we trust they will not be regarded. At the same time, we hope that the Bill will receive the fullest investigation; and it is well worthy of consideration, whether the better mode of effecting this reform (which is now expected and called for by a large part both of the profession and the public), would not be to refer the whole subject to competent persons, not to *report* upon it but to *do* it. It is to be remembered that the recent alterations in Common Law pleadings and process were effected by entrusting general powers to the judges, and similar statutory powers have been recently given to the Equity judges over Equity pleadings and practice. A similar delegation of legislative functions may not be so easy or proper with respect to conveyancing forms, but we must say, we see no remedy so efficient for carrying out the necessary reform as to create similar powers, extending over these same forms. The persons entrusted with this important duty, if properly selected, would perform with authority the necessary changes, and we cannot doubt that they would acquire the confidence of the profession.

We are now ripe, as we believe, for a step of this kind, and it would put an end to much doubt and even alarm, which, as we understand, are felt in some quarters. But if this step be taken at all, it must be taken with the bonâ fide intention of effecting all that can be done. Until the proper security be given, that the necessary reform shall be effected, the large portion of the profession which has declared in favour of Conveyancing Reform, must proceed with such means as are in their power to effect it themselves; and we warn them in this matter equally against open foes as against seeming friends, who, finding that relief must be granted, and that great changes must be made, would willingly take the direction of this movement out of the hands of those who have originated it, and given it its present strength. If the true friends of the cause will only be united and will persevere, success must attend their efforts.

III. But we pass on to another burden on land which we

have already glanced at on previous occasions, but which is sufficiently important to be treated of more at length. We mean the stamps now levied on deeds. It has long been a standing complaint with the profession, that the law on this subject is in a very confused and unsatisfactory state, scattered over acts 100 in number, and thus exceedingly difficult to act on in practice. Consolidation has been attempted by two late chancellors of the Exchequer, Lord Althorpe and Mr. Spring Rice, but in vain; and their successors have not even attempted this. It would indeed be exceedingly useful if the new act were simply to form an intelligible digest of the old law; but we trust that when this is done, the opportunity may be taken to revise the whole law on this subject. There is also another reason for it which has been often pointed out. The present rate of duties is as unfair as it is unwise in its operation on small transactions. Above 1000*l.* the ad-valorem duty amounts to about 1*l.* per cent.; but below that sum, instead of being equal or lower, it is higher. Thus, on a purchase of 20*l.*, a stamp duty of 1*l.* is payable, and a little less on mortgages. These matters have already been repeatedly brought before the public, although hitherto without effect. But the alteration which we are about to propose is a much larger one. To enable our readers to judge of it, let us first state the amount of revenue produced by the stamps on deeds for a series of years.

Year ending 5th Jan. 1845.

STAMPS ON DEEDS IN GREAT BRITAIN.

Gross produce - - - - - £1,677,546 3*s.* 6½*d.*
Finance Accounts, 1845, p. 47.

Ditto for year ending 5th Jan. 1844 - £1,498,931 8*s.* 9½*d.*
Finance Accounts, 1844, p. 47.

Ditto for year ending 5th Jan. 1843 - £1,499,766 4*s.* 9½*d.*
Finance Accounts, 1843, p. 47.

Ditto for year ending 5th Jan. 1842 - £1,580,669 17*s.* 10*d.*
Finance Accounts, 1842, p. 47.

Ditto for year ending 5th Jan. 1841 - £1,618,770 0*s.* 0*d.*
Finance Accounts, 1841, p. 47.

It will be seen, therefore, that this has not been an increasing head of revenue, being nearly as much in 1841 as in 1845.

Let us now state the amount of duty produced by legacy, probate, and administration duty. A return has been made as to this in the present year, which shows that this branch of stamps has produced more than *two millions* for many years. For the last year it is as follows:—

TOTAL AMOUNT OF DUTIES FOR LEGACIES, PROBATES, AND ADMINISTRATIONS FOR GREAT BRITAIN.

Legacy Duty for the year ending 5th Jan. 1846 - £1,266,940

Probate, &c. Duty for the year ending 5th Jan. 1846 1,029,954

Total for the year ending 5th Jan. 1846 - 2,296,894

Returns (H. C.), 1846, No. 71.

The stamp on deeds, then, is less than the probate and legacy duties. But that the real property of the country is capable of producing a larger amount of duty on an equal pressure than the personal property is shown by the produce of the property and income tax.

Schedule A., which included all lands, tenements, and hereditaments or heritages, in respect of the property thereof in Great Britain, 7*d.* for every 20*s.* This produced in the year ending 5th April, 1843, 3,723,034*l.* 7*s.* 5*d.*

Schedule B. All lands, tenements, and hereditaments, in England, in respect of occupation, for every 20*s.* the sum of 3½*d.*; and in Scotland, 2½*d.* It produced in 1843, 231,837*l.* 13*s.*

Schedule C. All profits arising from funds or shares, 7*d.* on every 20*s.* This produced 812,982*l.* 13*s.* 1*d.*

Schedule D. Profits and gains from other property, 7*d.* for every 20*s.*, 1,235,147*l.*

Returns (H. C.), 1844.

These returns pretty clearly show that the real property of Great Britain produces more than the personal property;

and furnish, as it appears to us, some data which would enable the government to judge, so far as the revenue is concerned, as to the propriety of revising the stamp laws.

Of the sum produced by the stamp duty on deeds, we have no means of knowing how much stamp duty is levied *ad valorem*. It has been stated by an experienced person whom we have consulted, that it may be set down as one half. But we will take it that a million is produced in this way. Surely there would be no difficulty in raising this sum by a remodelling of the Stamp Act, which should place real and personal property on the same footing. The residue we should still wish to see raised by a uniform stamp duty on all deeds. The alienation of land would thus be relieved from the oppressive part of this burden on land.

But with respect to settlements and all successions to property, whether of real or personal estate, we think it would be well to place the stamp duty on a uniform footing. By the present law, settlements of real estate are subject to no *ad valorem* duty, while settlements of money or stock are so subject; and the same distinction obtains as to devises and legacies of real and personal estate. This inequality, we think, should be remedied; and upon this basis we should like to see a revision of the stamp laws carried through.

The landowners, as contributors to this tax beyond their fair proportion, may now very fairly ask to be relieved from their privileges and burthens together. Probably, if levied judiciously, a stamp tax would be considered less vexatious and objectionable by the parties who pay it, than almost any other direct impost, and the state might derive a still greater amount of revenue than it obtains from the present duties.

The tax, also, presses in another way unfairly on property which is only of small value; for, not only is the scale of duties unfairly constituted, but every deed is also taxed according to its length. Now, the instrument which conveys a small property is, or ought to be, often longer than that which conveys a considerable estate; for when a small piece of land is sold, the earlier title deeds are seldom de-

livered over to the purchaser, and under such circumstances he would naturally wish to incorporate them into his conveyance by means of recitals; but, unless he submits to the expense of additional stamps, he must forego that advantage; although upon a re-sale he will very likely experience difficulties and objections, because he cannot show any title beyond the bare conveyance to himself.

Again; in mortgage transactions, whether money is advanced for a long or short period of time, the borrower has to pay the same stamp duty; whenever, therefore, a loan is required for a short period, stamp duties are evaded by what are termed equitable mortgages, *i. e.* by the borrower depositing his title deeds with the lender as a security for the sum borrowed.

Thirdly; as a tax upon capital these exorbitant duties are highly reprehensible. A private individual who lives upon his capital is condemned for his imprudence, and surely similar conduct on the part of a state must deserve equal reprobation. Such a course of policy exhausts a nation's resources, and leads to national improvidence and ruin. In our opinion, a legacy duty is the only tax upon capital which ought to be tolerated. Our reason for excepting *it* arises partly because the state, by protecting and distributing an individual's property after his death, may be considered as entitled to a remuneration from those who benefit by such protection; the remuneration or tax being proportioned to the degree of relationship, and those natural ties and duties which prompt individuals to leave their property among near relations. Legacy duty ought, however, to be payable in respect of real as well as personal estate; though in the case of realty the duty might be payable by annual instalments, as it is upon annuities, in order to prevent the necessity and inconvenience of selling small portions of an estate for payment of the duty. Probate and administration duties being levied upon successions without regard to the propinquity of relationship, ought most decidedly to be abolished, for they frequently operate as a heavy tax on diminished means, as in the case of a husband or parent dying who was mainly dependent upon a precarious income.

A very little reflection will show that duties which are imposed on the sale of land, or on the stamps used in its conveyance from one party to another, commonly fall on the sellers who are almost always under the necessity of selling, which forces them to take such a price as they can get. Buyers, on the contrary, are scarcely ever under the necessity of buying; they will therefore only give such a price as they like; they consider what the land will cost them in tax and price together. The more they are obliged to pay in the way of tax, the less they will be disposed to give in the way of price. Such taxes therefore fall almost always upon a necessitous person, and must frequently be very cruel and oppressive. It is obvious that the same reasoning must apply still more forcibly to the duties which are chargeable on mortgages. But further, political economists object that all duties on the transfer of property have a tendency to prevent its coming into the hands of those who would use it most advantageously. They recommend that every facility should be given to the conveyance and exchange of all kinds of property, inasmuch as that is the most likely means to make capital find its way into the hands of those who will employ it with the best effect in increasing the produce of the country. Why does an individual wish to sell his land? it is because he has another employment in view in which his funds will be more productive. Why does another wish to purchase this same land? it is to employ a capital which brings him too little, which was unemployed, or the use of which he thinks susceptible of improvement. This exchange will increase the general income, since it increases the income of these parties; but if the charges are so exorbitant as to prevent the exchange, they are an obstacle to this increase of the general income.

If these recommendations were carefully attended to, we think the Stamp Office and Post Office might be united into one establishment; nothing could be more convenient than the Post Office machinery for supplying the public with stamps and for collecting the revenue, being very simple and within every body's reach. We should find the law readily complied with, whilst a very large portion of the expense

which is incurred in maintaining the present Stamp Office establishment would be saved to the nation.

We have now done — we have proposed great changes, but they are not greater in our opinion than the occasion requires. The public demands, present circumstances favour them, and the profession itself is rapidly discovering that it is not only its duty but its interest to comply and assist in obtaining them.

ART. XII. — THE BAR, THE BENCHERS, AND THE JUDGES.

Origin and Early History of the Benchers of the Inns of Court.
Printed (privately) by Roworth, 1846.

Note on the Jurisdiction of the Judges as Visitors over the Election of Benchers. By AMICUS CURIÆ, 1846.

THE mode of election to the office of Bencher of the Inner Temple has forcibly arrested the notice of the legal profession, as each barrister may feel a personal interest in the subject, and excited an almost unanimous sentiment of indignation and alarm. It appears to be the practice of the masters of the bench of that inn to determine upon the admission of any new master by secret ballot, and to refuse to receive any individual against whom a single black ball appears. There need be no charge or complaint openly made to the masters, but by a clandestine vote any master of the Bench may gratify his private spleen, and impose upon the obnoxious candidate, who from his position is compelled to solicit the distinction, the personal indignity of rejection. The society of the Inner Temple alone is tainted with this system of secret voting. At Lincoln's Inn, the Middle Temple, and Gray's Inn, the only form is the passing of a resolution that the new Queen's Counsel be invited to join the Bench. In case of opposition the majority decide by open voting. At the Inner Temple alone

by the maintenance of this anomalous bylaw, the private unavowed act of one Bencher may exclude a Queen's Counsel from the customary incident of his rank—may deprive him of an appointment both of honour and profit strictly analogous to a college fellowship, and inflict a serious injury both on his private character and on his social and professional position.

Against this anomalous innovation of tyranny an universal protest has been entered by common consent; in general society it meets with no defender; the press have condemned it with one accord; and a body of not less than 119 Barristers, members of the Inner Temple, have signed a temperate, but firm and able, memorial denouncing its injustice.

Their general reasoning has been already given in this work¹, and the consent of public opinion has been so marked that we should long ere this have anticipated a voluntary renunciation by the Benchers of the Inner Temple of such an offensive and dangerous power. By giving up an untenable position, which cannot long be maintained, they would have made a graceful concession to the wishes of the profession not less desirable for the sake of protecting the character of those who exercise this arbitrary prerogative, than for the sake of the candidates who may be subject to it. *Dis aliter visum.* Their tacit refusal furnishes another proof of the tenacity with which all public bodies cling to power, however invidious—of that easy, pliant, elastic conscience which may be stretched to any length in corporations, lay as well as clerical, even when the aggregate is composed of men of the nicest honour. We might entrust our estate, life even, and good name with safety to each individual member, but woe to the credulous appellant from its decrees, whose sole reliance rests on the tender mercies of a parliament, on the strict justice of a board. In the assurance of right being yet done, though tardily, we rejoice to learn from common fame, that the gentleman whose rejection provokes enquiry has appealed to the fifteen Judges as *ex officio* visitors of the Inns of Court to institute an investigation into the causes and grounds why one of her Majesty's Counsel has been de-

¹ See 3 L. R. 346, *et seq*

nied admission to the Bench, and we cannot fancy a doubt as to the result of his appeal. Its importance none can question. It is not the individual merely, but every Barrister of the Society, whose rights are impugned; not the private feelings of a single Queen's Counsel, but the privileges and incidental advantages of the whole class, which are in controversy; the uncontrolled power of the Benchers is at issue—their irresponsible system of governing is at stake. That the legislature may not, we trust the Judges will, interfere.

Should they decline to exercise that visitatorial authority with which they have been for centuries invested, the principle would be admitted that the power to reject, without assigning any reason, exists beyond question in the Bench; and there being no longer any security against the recurrence of the abuse, nor any remedy to correct the mischief, a case for the interposition of the Legislature would be complete. As *amici curiæ* we should deprecate such a course, and prefer the alternative of appeal to the constituted authorities, the recognised visitors of the inn. That we may offer some slight assistance to the right determination of this important question, we propose shortly to review the discipline and government of these societies, as developed in their early antiquities and history; to consider the office of Benchers and his power over Members of the Bar, especially in reference to the obnoxious bylaw in question; and to show the superintending jurisdiction of the Judges as *ex officio* visitors of the Inns of Court upon appeal. The origin of the Inns of Court is correctly described by Blackstone¹, who, after stating that the professors and students of the municipal or common law were brought together by the fixing of the Courts at Westminster in the 13th century, continues:—

“In consequence of this lucky assemblage, they naturally fell into a kind of collegiate order; and being excluded from Oxford and Cambridge (where the canon and Roman law was exclusively taught), found it necessary to establish a new university of their own. This they did by purchasing at various times certain houses (now called the Inns of Court and of Chancery) between the city of Westminster, the place of holding the King's Courts, and the

¹ Com. 23.

city of London, for advantage of ready access to the one, and plenty of provisions in the other. Here exercises were performed, lectures read, and *degrees were at length conferred in the common law, as, at other universities, in the canon and civil.*"

We are told in Hearne's *Curious Discourses* that they were called inns from the old English word applied to houses of noblemen and persons of note, as the French *hostel*; and Inns of Court, because the students learned there those laws which would enable them to practise in the Courts at Westminster, and pursued such other studies as might render them better qualified to serve the King in his court. The earliest mention of these students now extant, their records having been destroyed in the insurrection of Wat Tyler, occurs in a demise from the Lady Clifford of a house near Fleet Street, called Clifford's Inn, "*Apprenticiis de banco,*" to the lawyers belonging to the Court of Common Pleas. Of the manner in which they flourished so far back as the reign of Henry VI., and of their exact discipline, we have a glowing report by Fortescue in his *Treatise*, "*De laudibus legum Angliæ.*"²

"In that which is least frequented of the four Inns of Court there are about 200 students. In their greater inns, a student cannot well be maintained under 8 and 20 pounds a year.¹ The students are sons to persons of quality; those of an inferior rank not being able to bear the expense of maintaining and educating their children in this way. So that there is scarce to be found throughout the kingdom one who is not a gentleman by birth and fortune: consequently, they have a greater regard for their character and honour than those who are bred in another way. There is, both in the Inns of Court and the Inns of Chancery, a sort of academy or gymnasium, fit for persons of their station, where they learn singing, and all kinds of music, dancing, and other such accomplishments and diversions (which are called revels) as are suitable to their quality, and such as are usually practised at court. Here everything which is good and virtuous is to be learned; all vice is discouraged and banished! The discipline in these inns is so excellent, that there is scarce ever known to be

¹ Edition by Amos, p. 183.

² According to Hallam, 16 is the proper multiple when we wish to ascertain the value according to the present standard. This would make the income 448*l.*, a clear exaggeration.

any piques or differences, any bickerings or disturbances amongst them. The only way they have of punishing delinquents is by expelling them the society, which punishment they dread more than criminals do imprisonment and irons; for he who is expelled out of one society is never taken in by any of the others. Whence it happens that there is a constant harmony amongst them, the greatest friendship, and a general freedom of conversation."

Could the rhetorical chief justice revisit that Temple now, in whose praise he has rounded with superlatives his Latin periods, what astounding symptoms of degeneracy would meet his bewildered gaze. Alsatia has intruded on the groves of Academe; plebeians have shouldered the sons of peers out of commons; and what appears to us far more melancholy, instead of excellent discipline, every man does that which is right in his own eyes, and, in lieu of constant harmony and the greatest friendship, a Benchers, in the exercise of a trust, slips his black ball into the ballot box! But to return to the review of these Arcadian times, the 15th and 16th centuries. The degrees that were conferred in the legal colleges are stated by Coke with his usual copiousness:—

"Now for the degrees of the law, as there be in the universities of Cambridge and Oxford divers degrees, as general sophisters, bachelors, masters, doctors, of whom be chosen men for eminent and judicial places, both in the church and in the ecclesiastical courts; so, in the profession of the law, there are mootemen (which are those that argue readers' cases in houses of Chancery, both in terms and grand vacations). Of mootemen, after eight years' study or thereabouts, are chosen utter-barrister; of these are chosen readers in Inns of Chancery. *Of utter-barristers, after they have been of that degree twelve years at least, are chosen benchers or ancients*; of which one, that is of the puisne sort, reads yearly in summer vacation, and is called a single reader; and one of the ancients that had formerly read reads in Lent vacation, and is called a double reader, and commonly it is, between his first and second reading, about nine or ten years. And out of these the King makes choice of his Attorney and Solicitor-General, his Attorney of the Court of Wards and Liveries, and Attorney of the Duchy; and of these readers are serjeants elected by the King, and are, by the King's writ, called *ad statum et gradum servientis ad legem*; and out of these the King electeth

one, two, or three, as please him, to be his serjeants, which are called the King's Serjeants. Each of the houses of court consists, of readers (or benchers), above twenty; of utter-barristers, above thrice so many; of young gentlemen, about the number of eight or nine score, who there spend their time in study of law, and in commendable exercises fit for gentlemen. The judges of the law and serjeants, being commonly above the number of twenty, are equally distinguished into two higher and more eminent houses, called Serjeant's Inn: all these are not far distant from one another, and altogether do make the most famous university for profession of law only, or of any one human science, that is in the world, and advanceth itself above all others, *quantum inter viburna cupressus*. In which Houses of Court and Chancery the readings and other exercises of the laws therein continually used, are most excellent and behoofful for attaining to the knowledge of these laws; and of these things this taste shall suffice, for they would require, if they should be treated of, a treatise by itself."¹

An exact notion of these laborious, almost interminable, mootings and exercises may be formed from the very minute account in Dugdale. Coke laments in his comment on Littleton (280 a), that the ancient readings had even in his day greatly degenerated, and had become rather riddles than lectures: he compares the readers to lapwings who seem to be nearest their nests when they are furthest from them, and whose study was to find nice evasions out of the statute. Two readings, however, that of Callis on Sewers, and Bacon's on the Statute of Uses, will ever remain lasting monuments of the curious industry and multiform learning that was lavished on them. In requital of their erudition, not the less welcome to King James for a mixture of pedantry, that royal scholar, in the sixth year of his reign, made a munificent grant to the societies of the Middle and Inner Temple, of the land and buildings which they had held as tenants to the Knights Hospitallers, till the suppression of the order in the reign of Henry VIII., and afterwards of the Crown by lease. By these letters patent (which are to be seen in the Rolls Chapel), in whose long and pompous recital the four Inns of Court receive honourable mention as *Quatuor Collegia*, existing from remote antiquity under the favour of the Crown, the whole of the land with all halls, chambers, &c.,

¹ Preface, 3d. Rep.

is granted to Sir Julius Cæsar, then Chancellor of the Exchequer, and fifty others by name, probably Benchers, but who are not so described, and their heirs, in trust, *pro hospitacatione et educatione professorum et studiosorum legum Angliæ*. The Latin is more legal than classical, but clear enough in its language completely to confute and overthrow the modern fantastical notion of the Benchers being a voluntary association of gentlemen, in the nature of a club. This important document has, we believe, never been published. It is a curious proof of the ignorance that has hitherto prevailed concerning the constitution of the Inns, that the late Lord Abinger, upon Mr. O'Connell's motion in the House of Commons, May 14. 1834, asserted that the whole of their property was the result of subscriptions amongst themselves, which had been handed down from one set of trustees to another, and was in fact as much private property as that which belonged to any gentleman in the House! This statement passed unquestioned! What a curious chapter might be formed of untenable propositions, hazarded for the edification of members by attorneys and ex-attorneys general. What a startling index of House of Commons law! but this we speak in a parenthesis, or, as in the directions of a stage play, aside. Very large revenues have been received for more than a century from the rents of chambers in the Temple; and so far the grant *pro hospicio* has answered the wishes of the royal donor. We fear that the sums expended, *pro educatione*, bear just the same proportion to those laid out on more material objects, that Falstaff's pennyworth of bread bore to his enormous quantity of sack. The Benchers of the Inner Temple awoke a few years since to the necessity of an examination in the classics before admitting students; but their predecessors, for more than a century slept the sleep of death. A searching examination of the neglect and *laches*, which suffered so responsible a trust to fall into abeyance, should surely in prudence not be invited by the Benchers. Yet in discussing their powers and functions before a select committee, this lax fulfilment, or, to speak more accurately, abandonment of duty, must be brought prominently forward "the very head and front of their offending." The careless apathy with which law studies were enforced in the reign of George I., is

complained of by Wynne in his valuable treatise (*Eunomus*), when exalting the law colleges.

“Those writers who have called the Inns of Court and of Chancery by the name of an university, do by no means degrade the term according to its more genuine and strict acceptation. In the first place, the number of distinct houses (comprehending those of the Inns of Court and of Chancery, the latter of which are in subordination to the former), are not much less than the number of colleges. But many internal circumstances will much better support the analogy. They agree in each having several degrees to be taken by the professors of their respective sciences, in various exercises required as qualifications for those degrees, and in the original institution of public lectures, though a disuse of these in the law societies has long made a breach in that part of the parallel. By the law lectures alluded to, I mean those readings on statutes that have been in ancient times so great a channel of legal instruction, — were delivered with so much pomp and grandeur, and derived so great an authority, of which the reading on the Statute of Uses is a sufficient instance. The internal government too is, as to its nature and institution, as perfect here as in colleges; the treasurer and benchers having the same power over the members by “the orders of the houses,” as the master and fellows have by the statutes of a college. If any thing, their domestic policy, though under an aristocratical form, is more extensive within the walls than it is in colleges; because the Bench unite the legislative and the executive power over their societies, as they not only execute orders in being, but can vary their orders or laws as occasion requires. Our inns differ from colleges as being possessed, I think, of no estates exclusive of their own, and the subordinate houses; their public incomes arising from fees on admittance of members and on taking degrees, from fines in nature of penalties for not doing exercise or paying dues, and from the profits of chambers. The degrees I mentioned in our profession are those of serjeant at law, benchers, and utter barrister. Blount, in his exposition of the term ‘utter-barrister,’ copies Cowell in the passage I have read, as far as licentiati in jure; he fixes the period of calling to the bar at seven years, but says nothing of the silence either enjoined or practised after being called; though it appears by the old orders, made in James the First’s time, and continued till after the publication of his book, that such silence was in fact then enjoined. After mentioning exercises usual before and after being called, he adds, “they are called utter barristers, that is, pleaders without the bar, to distinguish them from benchers, or those who have been readers; who

are sometimes admitted to plead within the bar, as the king, queen, or princes' counsel are."

In exact proportion to the apathy of modern Benchers with regard to lectures and tuition, was the over-active zeal of their pains-taking predecessors. The readers to the Inns of Chancery ate their way to the Bench by digesting tomes of black letter. We learn from Herbert's History of the Inns of Court that the terms were synonymous.

"Also the benchers are these utter-barristers which, after they have continued in the house by the space of fourteen or fifteen years, are by the elders of the house chosen to read unto all the company of the house in one of the two principal times of their learning, which they call the grand vacation in summer; and during the time of his reading, he hath the name of a *reader*, and after of *bencher*." (p. 214.)

"The Society of the Middle Temple, as well as the Inner Temple, consists of benchers, or such as have been readers, anciently called apprentices of the law, members, barristers, and students; formerly denominated utter-barristers and inner-barristers, being students under seven years, and all of whom had their commons in the hall. The government of the society is vested in the benchers, whose general meetings to transact business are (and long have been) dignified with the name of parliaments, and are held with much state and dignity." (p. 224.)

The manner of holding the parliaments is as follows:—

"First, the benchers only who have been readers meet in the parliament chamber, which is at the lower end of the hall, and take their place according to their seniority. Then the treasurer for the time being sits at the table bareheaded, and reads petitions, or proposes such other subjects as are to be discussed; the under-treasurer standing by as an attendant. *If a difference of opinion occurs, the notes are taken separately, beginning at the youngest, and the majority determines it.* Formerly men who had been called to the Bench to read, attended these parliaments till they had fulfilled the office of reader; but that objection was afterwards dispensed with." (p. 229.)

"The reader was thus created a bencher. The first parliament of the succeeding term he was invited by the benchers; where being come and modestly taking the lowest seat, one of his assistants in a formal oration declared the reader's great learning, and the expense he had been at; and having finished this compliment,

the reader himself, in another grave oration, magnified the important assistance he had derived, in the fulfilment of his office, from the gentlemen of the society; after which, having received the thanks of the Bench, they all together sit down to supper; *at which time (and not before) the reader is an absolute and confirmed benchers*, and hath voice with the rest in all succeeding parliaments." (p. 238.)

"The office of reader was attended with great expense, inasmuch (says Stowe) as some have spent above 600*l.* in two days less than a fortnight, which is now the usual time of reading."

"It was not unusual for the utter-barristers chosen to fine for it, like a modern sheriff. Thus it appears, that Thomas Cæsar (8 Jac. 1.), a benchers of the Inner Temple, not having read, but fined for not reading, was allowed notwithstanding to take his seat at the Bench table. In 3 Elizabeth, an order or bylaw was made at the Inner Temple, providing that every benchers not a reader should be at five moots in every term, and in Michaelmas Term at six, upon pain of five shillings every moot. From this it is clear that reading was not then an indispensable, though it was undoubtedly the usual and formular, preliminary to the Bench."

When Selden was chosen reader of Lyon's Inn he positively refused to read. The Benchers of the Inner Temple, to punish his contumacy, passed an order, dated October, 1624, which, after reciting his grievous provocation, declares —

"The masters of the Bench, taking into consideration his offence and contempt, and for that it is without precedent that any man elected to read in Chancery hath been discharged in like case, much less hath with such wilfulness refused the same, have ordered that he shall presently pay to the use of this house the sum of 20*l.* for his fine, *and that he stand and be disabled ever to be called to the Bench, or to be a reader of this house.* Now at this parliament the said order is confirmed; and it is further ordered, that if any of this house which hereafter shall be chosen to read in Chancery shall refuse to read, every such offender shall be fined and be disabled to be called to the Bench, or to be a reader of the house.

"Eight years later the following entry appears. — Michaelmas Term, 1632 :— It is ordered at this parliament that Mr. John Selden, one of the utter-barristers of this house, shall stand enabled and be capable of any preferment in the house in such a manner as other utter-barristers of this house are, to all

intents and purposes, any former act to the contrary notwithstanding : and, accordingly, he was called to the bench the Michaelmas following.”¹

To regulate and assist the Benchers in their task, then an arduous one, of governing and instructing the Societies committed to their charge, various orders were made from time to time, sometimes by advice of the Privy Council and Judges, sometimes by the Judges only, and sometimes by the Benchers, by advice and discretion of the Judges, proceeding from the King’s suggestion.

Dugdale’s valuable work *Origines Juridiciales* abounds with passages which shew that the Judges made regulations to be observed by the Inns of Court, not only respecting the admission to the Bar, but generally regarding the conduct of the Members of the Inn and the admission of Students. Even the Benchers were treated as graduates of a higher order, and subject to collegiate regulations like the rest. The Inns themselves, it would appear from these orders, were completely under the control of the Crown, and the Judges as Visitors. In fact they had, and could have no powers or privileges of any sort, except by royal favors, or as delegates of the Judges. Unless the Crown had fostered the forensic university, it could never have risen to importance ; and the degree of barrister would have been valueless, unless the Judges had refused to allow any to plead as advocates who had not obtained it. The Common Law Commissioners observe,

“ They (the Inns of Court) are voluntary Societies, which for ages have submitted to government analogous to that of other seminaries of learning ; but all the power they have concerning the admission to the bar is delegated to them from the judges ; and, *in every instance*, their conduct is subject to their control as visitors.”

As many of the Orders are curious in themselves, and most important vouchers for the right of the Judges to interpose, we shall enrich our disquisition with extracts. The first that it will be useful to quote are —

¹ Selden’s Works, Latin Edit. Life, p. 10.

"Orders necessary for the government of the Innes of Court, established by the commandement of the Queen's Majesty, with the advice of her Privy Counsell, and the Justices of her Bench and the Common Place at Westminster, in Easter Term, an. 16 Reginæ Elizabethæ, 1574.

"Imprimis. That no more in number be admitted from henceforth than the chambers of the houses will receive, after two to a chamber. Nor that any more chambers shall be builded to increase the number, saving that in the Middle Temple they may convert their old hall into chambers, not exceeding the number of ten chambers.

"Item. None hereafter admitted shall enjoy any chamber, or be in commons, unless he do exercise moots and other exercises of learning within three years after his admission, and be allowed a student or inner barrister by the bench.

"Item. None to be called to the utter bar but by the ordinary counsell of the house, in their general ordinary counsell in the term time."

We also find in Dugdale, Orders signed by five Judges, and expressed to be set down by the general consent, as well of all the Judges, as of the Bench of Gray's Inn, hereafter to be strictly observed in that society.

"None shall be called to read in regard of antiquity or course but such as are men of good sufficiency for their learning, credit, and integrity to serve in the commonwealth; and none shall be admitted to read single that hath not been a continuer, both in four terms and two readings, by the space of one whole year next before his reading; and, nevertheless, it is not meant but their serving two vacations after the reading, according to former orders, shall stand and continue.

"The readers in Court and Chancery shall make their cases short, not containing above three points; and these in reading in court as much upon the statutes as may be.

"The pleadings in moots, both in the hall and library and Inns of Chancery, by the inner barristers, shall be rehearsed without book, and in nowise read; and so likewise by the first of the utter barristers, and by the puisne of the bench, be he reader or otherwise; and not to go to the case without the pleading recited."

The Judges appear to have made regulations as well before as after admission.

"At Serjeants' Inne, 20 Junii, anno 38 Eliz. — It was agreed

by all the Judges, by the assent of the benchers of the four Innes of Court, that hereafter none should be admitted into Innes of Court till he may have a chamber within the house.

"That the readers hereafter be chosen for their learning, for their duly keeping of the exercises of their house, for their honest behaviour and good disposition, and such as for their experience and practice be able to serve the commonwealth.

"That no benchers be called but such as be fittest both for their learning, practice, good and honest conversation; and that they call not to the bench too often, but very sparingly, in respect of the great multitude that there be already."

Then follows an extraordinary Order of Council, 1 Jac., which the Judges had not before them in Wooler's case:—

"We having received the King's Majestie's pleasure and express commandment by the Right Honourable Sir John Popham, Knight, Lord Chief Justice of England, and the rest of the Judges, that none be from henceforth admitted into the society of any house of Court that is not a gentleman by descent, do now therefore order, that from henceforth none shall be admitted in this society contrary to the said commandment of the King's Majesty."

This Minute prohibiting the admission of the Commonalty as Students is signed by Coke, Bacon, and three Common Law Judges.

Cunningham, in his *Antiquities of Inns of Court*, cites an order 33 Eliz. made by the Chief Justice and all the residue of the Judges of both benches, and the Barons of the Exchequer. "We perceiving that the late examples of short and few readings are so dangerous as they are not longer to be suffered, have thought it very necessary that the same readings and charges of the reader shall be from thenceforth used as followeth." They then regulate the number of readings, charge of baking, bucks, &c.

"And the said justices do think it meet that the said reader should be advised by the benchers of their houses not only in the proportion of their own diet, but also what number of guests and what sort they should bid to their table during their reading, to the intent that a mediocrity may be used frugally, without excess."

By the general orders of 36 Eliz. addressed to all the inns, it is ordered—

"5. That before any be called to read, a note of the names of three or four next in turn to read be delivered to the justices of the house where the same shall be; and in default of such justice, to the chief justices and chief baron for the time being; *to the end that they may give their advice therein.*"¹

It would seem that the Judges did not issue the ungallant order 23 Eliz., that no laundress nor women called victuallers should thenceforth come into the gentlemen's chambers of the society unless they were full forty years of age; or 5 Car. 1., that no women be suffered to be in the chapel of Gray's Inn at any time. There was an order, however, made by all the Judges for all the Inns of Court, 1 Eliz., which would have gladdened the heart of the late Mr. Justice Park, that no fellow of their Society should wear a beard above a fortnight's growth!

The last orders we meet with which received the sanction of the Judges were made in 1664 by the Right Honorable the Lord High Chancellor of England, and all the Judges of both Benches, and Barons of the Exchequer, by the command of the King's Majesty, signified by the Lord Chancellor for the government of the Inns of Court and Chancery.

"That the Innes of Chancery shall hold their government subordinate to the benchers of every of the Innes of Court to which they belong, and that the benchers of every Inne of Court make laws for governing them as to keeping commons, and attending and performing exercises, according to former usage. And in case any attorney, clerke, or officer of any court of justice, being of any of the Innes of Chancery, shall withstand the directions given by the benchers of the court, upon complaint thereof to the judges of the court in which he shall serve, he shall be severely punished, either by forejudging from the court, or otherwise, as the case shall deserve."

"9. That the benchers hereafter be chosen for their learning, for their duly keeping of the exercises of their house, for their honest behaviour and good disposition, such as for their experience and practice be of best note and best able to serve the kingdom; and if any refuse to read, then they do undergo such fine and censure as the benchers and readers shall think fit to lay upon them; which, if they shall refuse to pay or perform, then, upon complaint to the judges, such course to be taken by them as shall enforce them to the performance thereof.

¹ Dugdale, p. 315

“11. That no benchers be called but such as be fittest both for their learning, practice, and good, honest conversation; and *that they call not to the bench too often, but very sparingly, in respect of the great multitude that be already.*”

Within four years from the date of the last of these orders the Judges found themselves compelled to assert their authority. The case is remarkable in itself, is amusingly told by Roger North in his *Life of Lord Guildford*, and furnishes an exact precedent for the interposition of the Judges on the present occasion.

“Upon his lordship’s being made of the King’s counsel, there happened a dispute in his society of the Middle Temple, which ended favourably to him, and augmented his reputation in Westminster Hall. The rulers of the society, called benchers, refused to call his lordship after he was King’s counsel up to the bench; alleging that if young men, by favour so preferred, came up straight to the bench, and by their precedence topped the rest of the ancient benchers, it might in time destroy the government of the society. Hereupon his lordship forebore coming into Westminster Hall for some short time, hoping they would be better advised; but they persisting, he waited upon the several chiefs, and with modesty enough acquainted them of the matter, and that as to himself he would submit to anything; but as he had the honour to be his Majesty’s servant, he thought the slight was upon the King, and he esteemed it his duty to acquaint their lordships with it, and to receive their directions how he ought to behave himself, and that he should act as they were pleased to prescribe. They all wished him to go and mind his own business, and leave this matter to them, or to that effect. The very next day in Westminster Hall, when any of the benchers appeared at the courts, they received reprimands from the judges for their insolence, as if a person whom his Majesty had thought fit to make one of his counsel extraordinary was not worthy to come into their company; and so dismissed them unheard, with a declaration that until they had done their duty in calling Mr. North to the bench, they must not expect to be heard as counsel in his Majesty’s courts. This was English; and that evening they conformed, and so were reinstated. It is one of the properties of an aristocracy to hate that any persons should come among them but of their own choosing. I have heard that since the Revolution, whereby (as they termed it) they were manumised, they have not called any of the King’s counsel extraordinary (who are now become numerous) to

the bench, which shows the different walks some matters will take in different times."

What truth there may be in this rumour, how far the jacobite prejudices of Sir Bartholomew Shower may have influenced his brother Benchers to outvote the admission of a Williamite candidate, we know not; the case which he cites is exactly in point.

The Judges made use of no idle threat when they declared that they would not hear the King's counsel, for their order in the reign of Charles I. is express: "And such reader as shall break any of the orders aforesaid, shall not be suffered to practise at any Bar at Westminster, A. D. 1627." When we remember how admirably the Courts were constituted at that time, to suppose that the chiefs usurped an authority beyond the Law, would be a gratuitous and unfounded aspersion on their learning and integrity. Kelynge was then Chief Justice of the King's Bench, Vaughan of the Common Pleas, and Hale Chief Baron.

It has been urged that there is no precedent since 1668 of the Judges interposing with reference to the election of Benchers; but the answer is plain that no case requiring such interposition appears to have been properly brought before them, and that if the jurisdiction ever existed, it is not in their power to abdicate it. Neither they nor any of their predecessors could have done so: now, that the jurisdiction did exist once, is proved to demonstration from the general orders; for the Judges who made those orders had impliedly the power to enforce them; and in those orders, as already seen, the qualifications of Benchers are carefully prescribed. Suppose, instead of choosing new colleagues for their learning and due performance of the exercises of the inns, the Bench had looked exclusively to convivial qualities—Would the Judges have remained quiescent, and suffered an entirely new sort of delegates to exercise the powers intended for the leaders of the Bar? The conduct pursued by the Judges in the time of Kelynge, Vaughan, and Hale, proves that they would not. Though the interposition of the Judges does not appear to have been called for by any further act of contumacy on the part of the Bench, their authority as visitors to control any violation of rule, or correct any abuse, appears to have been recognized by the

Courts of Law and Equity on several occasions. It will be no uninteresting study to trace them in their order.

The first in point of time is Booreman's Case quaintly and pithily reported in March, p. 177., Hil. Term, 17 Car. 1. Booreman was a barrister of one of the Temples, and was expelled the house, and his chambers seized for non-payment of his commons, whereupon he by Newdigate prayed his writ of restitution, and brought the writ into Court ready framed; which was directed to the benchers of the said society; but it was denied by the Court, because there is none in the Inns of Court to whom the writ can be directed, because it is no body corporate, but only a voluntary society, and submissive to government; and they were angry with him for it, that he had *waived the ancient and usual way of redress for any grievances in the Inns of Court, which was by appealing to the Judges*, and would have him do so now.

The next case tending to prove, that for all disputes and complaints within the Inn, redress is first to be sought from the Benchers, and in the event of failure, from the Judges, is reported in Keble, whose proverbial inaccuracy may account for the lax decision that an appeal lies first to the Chief Justice, then to the Chancellor. It is the case of Clement's Inn, 13 Car. 2. The Master and Society moved for restitution to a chamber upon a forcible entry, which was granted: but the Court would not meddle with the cause, but ordered the young men to submit and appeal to their Inn of Court, and thence to the Chief Justice, and thence to the Lord Chancellor, and they allowed a society may seize a chamber for non-residence or want of commons of any man, and would have laid one or two of the assistants by the heels till restitution and conformity, but would not determine the right of any chamber there; but unless possession was delivered this day, they ordered a tipstaff to do it.

There was a case decided by the Master of the Rolls, Rakestraw and another v. Brewer (2 P. Williams, 510.), that a bill in Equity will not lie to redeem a mortgage of chambers in the Inns of Court; but the plaintiff must apply to the Bench, and, if not redressed there, then to the Judges of the Society: *secus*, if on application to the Bench, they refer the plaintiff to his remedy in Equity — a foolish rea-

son to give. The next authority in the Equity Courts is very important, *Cunningham v. Wegg and others*, 2 Browne Rep. by Belt. 240. (July 1787.)

"Bill by a member of Gray's Inn against the benchers, for an account of monies paid for the renewal of grants of chambers, and that the society might be decreed to renew the plaintiff's term in several sets of chambers.

"Defendants pleaded that there are four law societies (enumerating them), one of which is called Gray's Inn, and stated it to be a voluntary society, governed by benchers, who make rules for the regulation of the society and the letting of the chambers, &c., *subject to an appeal, in case of disputes, to the Lord Chancellor and the twelve Judges.* Mr. Attorney-General and Mr. Lloyd in support of the plea. The societies for the study of the law are mere private voluntary societies, regulated by their respective benchers, and not liable to account in this court. Where two members have a dispute between themselves, the benchers are the proper forum to decide it. *Where the dispute is between the society and a member, the appeal is to the twelve Judges.* There is no instance of any of the courts interfering, either with respect to calling to the bar, or the interior government of the society; on the contrary, the courts have always refused to interfere. 1 Keble, 135.; *Booreman's Case*, March, 177.; 2 Williams, 511.; *Hart's Case*, Douglas, 340.

"Mr. Mansfield, Mr. Scott, and Mr. Richards for the plaintiff. The plea cannot be good as a plea to the jurisdiction. It avoids the jurisdiction of this court without pointing out another forum; for it appears that in all questions the first forum is the bench itself, and there is an appeal only to the judges, who have no original jurisdiction. It is impossible to go to the judges: how should they decide upon the rights of individuals? and if they decide, how can they enforce the execution of their sentence? What officer have they in the present case to take the account? What remedy can they apply, if they should think the plaintiff entitled to have his money returned? can they take the defendant's goods in execution? It is impossible they should exercise the jurisdiction. The plea ought to point out a competent forum, and, not having done so, it must be overruled.

"Lord Chancellor. It is a good plea. There is no instance of a suit, either relative to the discipline or the property of chambers in an Inn of Court. *The defendants say, as far as they have acted, they are liable to the jurisdiction of the judges.* It is a claim among persons having privileges; therefore this is not the proper jurisdiction. — Plea allowed."

The conclusion to which Lord Thurlow came had been previously adopted by Lord Mansfield in the memorable case of *Hart v. The Benchers of Gray's Inn*, (Pasch, 20 Geo. 3. reported in Douglas, V. 1. P. 353.) The Chief Justice enuniated as a clear principle, that "all the power of the Inns of Court concerning admission to the bar is delegated to them from the Judges, and that *in every instance* the conduct of those societies is subject to the control of the Judges as visitors. A mandamus will not lie to compel the Masters of the Bench of an Inn of Court to call a candidate to the bar. From the first traces of the existence of the Inns of Court, no example can be found of an interposition by the Courts of Westminster Hall proceeding according to the general law of the land; but the Judges have acted as in a domestic forum. If a person conceive himself to be aggrieved by the Benchers of an Inn of Court in refusing to call him to the bar, or in disbaring him, it seems that the proper application for redress is a petition of appeal to the twelve Judges, to be assembled for that purpose, and approved and subscribed by such Judges, or any eight or more of them." In consequence of this opinion, Hart afterwards applied by petition of appeal to the twelve Judges, and on the 15th of November, 21 Geo. 3., he was heard by his counsel, Morgan and Lind. A certificate was laid before the Judges from the treasurer and benchers of Gray's Inn, in which they set forth that they had not refused to call him to the bar merely because he had been discharged by the insolvent act (although they stated that the society of Lincoln's Inn had been of opinion that this was a sufficient cause), but because it appeared to them, from a memorial of his own, that he had knowingly become security for money borrowed by others to a much greater amount than he was able to answer. The Judges were unanimous in rejecting the petition.

Though the Judges presided in their domestic forum about a dozen times during the interval to decide disputes respecting calls to, or dismissals from, the bar, nearly half a century elapsed before their attention in Court was again called to the subject.

When the Benchers of Lincoln's Inn arbitrarily refused to admit Mr. Wooler as a student on account of his having

formerly edited a seditious work, "The Black Dwarf," he appealed to the Judges; but failed in his appeal, being a stranger without the gates. The Judges, we find from the report, 4 Barn. & Cress. 855., admitted their power as visitors, but limited it to cases in which all the parties were actually admitted members of the inn. Abbot, Chief Justice, says:—

"If the party now applying to the Court were an actually admitted member of the society, and had acquired an inchoate right capable of being perfected, it might then be fit for this Court (in the absence of any other remedy) to interfere by mandamus in order to perfect that right; but if the particular society improperly refuse to call a particular member to the bar, the remedy is not by mandamus, but by appeal to the twelve Judges." He cites the dictum of Lord Mansfield, that the Inns were voluntary societies which for ages have submitted to government analogous to that of other seminaries of learning, and then adds, according to the report in Dowling and Ryland, vol. vii. p. 363., which is more full than the report in Barnewall and Cresswell: "The expression *submitting to government*, must be understood to mean a submission to the rules and regulations of the society itself for the government of its members, after they have been admitted into the association. The submission there alluded to is to government as exercised by the heads of the particular society over actually admitted members. But even *where an actually admitted member has reason to complain of any act done or omitted to be done by the heads of the society, the twelve Judges act as visitors* in the nature of a domestic forum, and may direct what is proper to be done in the matter which is the subject of complaint."

Mr. Justice Littledale concurs in the propriety of discharging the rule for a mandamus, but makes an important observation. "The interference of the Judges at the instance of those members of the societies whom the benchers had refused to call to the bar was perfectly right, because a member who had been suffered to incur expense with a view of being called to the bar, thereby acquires an inchoate right to be called, and, if the benchers refuse to call him, they ought to assign a reason for so doing; and if there be no reason, or an insufficient one, then the member who has acquired such inchoate right is entitled to have that right perfected."

Applying this argument to the case before us, we may say, "A queen's counsel has acquired by his patent an inchoate right to be called to the bench table, and if the benchers refuse to call him, they ought to assign a reason for so doing;

and if there be no reason, or an insufficient one, then the Queen's counsel who has acquired such inchoate right is entitled to have that right perfected.

Perhaps we may be excused for remarking on the case of the Benchers of Lincoln's Inn, that, though it affirms the principle for which we contend, there may be a grave doubt whether, if the attention of the Court had been called to the General Orders and decided cases, they would have refused to hear the complaint of one who asserted his right to admission: with a natural love of ease, they seem to have shunned the imposition of an irksome duty. A slight *suspicion* of the same feeling may be excited by the last reported case upon the subject of their interference as Visitors, *R. v. Barnard's Inn*, 5 Adolphus and Ellis, p. 17., where a Rule for a Mandamus to the Principal and Antients of Barnard's Inn was applied for to admit an attorney. The Court decided, rather evasively, that there was nothing on the face of the affidavits which gave them authority to interfere. The principle of their general power as Visitors was in both cases admitted; and necessarily — for their power is only coexistent with, and subject to the right of appeal. In the terse language of Tacitus, we may say '*Pereunte obsequio etiam imperium intercidit.*' This right was expressly conceded by some of the Benchers, and recognised by the Law Officers of the Crown upon a memorable debate in the House of Commons. The Bar of Lincoln's Inn, on the motion of Mr. Clifford, a somewhat eccentric person, had submitted a motion to the Bench, which was adopted, with Lord Erskine in the chair, and declared as a bye-law, "that no person who has written for hire in the newspapers shall be admitted to do exercises to entitle him to be called to the bar." Against this rule of an oligarchy, Mr. Farquharson presented a petition to the House, February 23, 1810, complaining that the Benchers of Lincoln's Inn had violated the principles of the constitution, and usurped the powers of the Legislature. Upon this petition Mr. Sheridan declaimed with much effect, and founded a motion that it should be referred to the Standing Committee of Courts of Judicature. The Solicitor General (Garrow) maintained that the twelve Judges had a jurisdiction not merely to redress the individual aggrieved by

the rule in question, but to reverse the rule itself. Sir J. Anstruther, as a bencher of Lincoln's Inn, hoped the honorable gentleman would not press his proposition, which he deemed an improper and unnecessary interference with the Benchers in the government of the Society, especially as an appeal might bring the particular case to the revision of the twelve Judges. The Attorney General (Gibbs) opposed the motion, because there was a legal remedy by application to the twelve Judges, to prove which, he read a case from Douglas' Reports, and therefore the interposition of Parliament would, in his judgment, be premature and improper. Upon an understanding that this very obnoxious bye-law would be repealed forthwith, as it almost immediately was, the motion was withdrawn.¹ The right of the Judges to interpose was conceded by every lawyer who spoke, and there seems no valid distinction between the right of a student to obtain the privileges of the Bar, and the barrister's right to retain his privileges, of which an acquired inchoate right by virtue of his patent, to become a Master of the Bench, unless rejected by the majority, is not the least. However reluctant to assume, we cannot suspect that the sages of the law will abandon their jurisdiction.

The orders and cases prove, that where a member has a grievance, the Judges will hear. When the Bench was a degree, a qualification for advancement and office of trust, the Bench might select four for readers, and upon just cause of dislike, pass over any whom they held not fit.² But the justice of the cause was matter of appeal from the Parliament to the Judges, and where they passed over a Bencher without just cause, we have seen in Lord Guildford's case how peremptorily the Judges overruled their scruples. The Bench is still a place of trust, of dignity, and of profit, the Benchers being entitled to chambers according to seniority. It would be superfluous to argue that the loss is no grievance; and if it be one, Lord Mansfield says, "for any grievance in the Inns of Court the usual way of redress is by appealing to the Judges." The manner in which the Bench in their parliament exercise any power over members, may form the

¹ Parliamentary Debates, vol. xv. p. 552. & xvi. p. 27—45. ² Dugdale.

subject of enquiry. In their general orders the Judges were as particular regarding calls to the Bench, as calls to the Bar.

Even were there no general orders, no reported cases, no recognition of authority by the Benchers in debate, by the simple admission that the Common Law Judges are general Visitors of the Inn, they acquire, from their character as Visitors, power to redress the grievance complained of. (*St. John's College v. Todrington*, 1 Burr. 200.) "A general visitor has all incidental power. The power of judging and giving relief upon complaints and appeals is incident to the office of general visitor." He has authority upon refusal, to admit a Fellow as well as upon ouster. (4 Mod. 369.) In *R. v. St. John's College, Cambridge* (4 Mod. 241.), Lord Holt says:—"The visitor is the proper judge of the private laws of the college, and is to determine offences against those laws." There must be a right of appeal against the governing body, that, if they have erred, the party may have right done him, or if they have acted according to the rules of law, that their acts may be confirmed. We have dwelt longer on the power of the Judges as Visitors, to correct the obnoxious bye-law complained of than on the bye-law itself, for its deformity is too manifest to require much comment. Strictly speaking, the rule is not a bye-law the Society not being a Corporation, but is in the nature of one, and upon principles of common law may be considered bad. That a single Fellow should possess an absolute *veto* upon the election of Fellows, and exercise that *veto* in secret, is a stronger instance than that given by Aycliffe of a bad bye-law. (*Phillimore's Burn, Title, College.*) In the case of *R. v. The College of Physicians*, 7 T. R. 287., Lord Kenyon says,—“The principal ground on which it was said in 4 Burr, 2199., that the bye-laws of the college were bad was, that they interfered with their exercising their own judgment, and prevented them from receiving into their own body persons known or thought by them to be really fit and qualified, and if we had found that that objection existed in this case, I should have thought it fatal.” The date of the bye-law here is kept a mysterious secret; but we conjecture that it must have sprung up subsequent to the Revolution, in the noxious heat of party strife, and for some private purpose, at a time when the Bench began to slumber over their trust, and the Judges had ceased

actively to interfere. But be the date what it may, no length of time can legalise a bad bye-law. (*R. v. Ashwell*, 12 East, p. 22.)

It is not necessary for determining the question of appeal that the bye-law should be absolutely illegal and void. Suffice it that the rule is arbitrary, suspicious, illiberal, open to misconstruction, liable to abuse, universally condemned, unlike that law of Stephen, of which a monkish historian informs us,—"Eo magis legis virtus invaluit, quo amplius eam nitebatur impietas infirmare."

Accuser, witness, judge, a single Bencher under this bye-law may lead his colleagues to condemn without hearing, and yet be utterly mistaken. As it revives the penalties of an attainder on character, it cannot escape the guilt. The maxim

"*Sic volo, sic jubeo, stet pro ratione voluntas,*"

may do well, says Eunomus, for Jupiter or a Roman despot, but not for an English potentate (nor say we for a Bencher).

In electing a Bencher formerly, the Bench elected a person to hold a high rank in the courts—to be enrolled among the candidates for the highest honours—to join in exercising the power of calling to the Bar delegated by the Judges—to sit in a judicial capacity in cases of discipline—to act as one of the public instructors of the profession, and to enjoy sundry valuable privileges within the Inn. The question is now argued precisely as if they were simply choosing a gentleman to dine at a particular table in the Hall. Nor can it be argued in any other manner: for if exclusion be ever meant to imply more than that the candidate is personally disagreeable to some member of the Bench, the present mode of exclusion is given up on all hands as utterly indefensible.

The great majority of those who contend that the Bench of an Inn of Court, principally composed of practising barristers and rivals of the candidate, should be invested with the power of checking the Chancellor in his distribution of the honours of the Bar, do not push their argument to an extreme, which would involve the reduction ad absurdum, that such a power should be vested in a single Bencher, who may

know nothing of the state of the profession in its every-day working attire,—Mr. Hallam, for instance. The most ordinary respect for the head of the law would require that his appointments should not be questioned without due consideration, and on grounds approved by the majority. As to social unfitness, equal or still greater care is required in deciding on such a delicate theme. A Queen's counsel attends the Queen's levees—the Chancellor's breakfasts—the Attorney General's dinners in town, and the dinners of the Judges on circuit. He sits in the front row with his fellows; he takes his place at the top of the table on his circuit, and above all, is named in all commissions of Assize and Oyer and Terminer, and frequently sits as a Judge. But at the very time he is so acting and living, the Benchers of the Inner Temple announce to the world that he is unfit for their society; though even in the Inner Temple (as if to complicate the question still more) the Bar table is open to him. On general, or public, or professional grounds, such an anomaly is without pretence of justification. The only way the Benchers can get rid of it, or avoid the blame of it, is by either at once resolving to exercise a sound discretion in each case to the complete exclusion of private motives, or by frankly avowing that to be black-balled at their bench means nothing more than the being black-balled at White's or Brooks's. How long they would retain their present powers and position after such an avowal is another question, which, for their sakes, we should not wish to see rashly mooted. The powers, privileges, and revenues entrusted to them may not co-exist with an avowed system of secrecy, irresponsibility, and arbitrary exclusion.

It is far more important for the Bench in their position to be morally than technically right; and they will be condemned on all hands if they attempt to rest the recent case of exclusion on the arbitrary doctrine. We have heard the course pursued in this instance illustrated by supposing a case in which an officer should be dismissed for alleged misconduct. He subsequently disproves the allegation to the entire satisfaction of the authorities; but is told that the Queen has a right to choose her own officers, and that it is not the practice of the Horse Guards to enter into explanations of any sort.

Good sense, right feeling, sound law, *Jus, Fas Lex*, appear to us to be in favour of the principle for which the Common Law Commissioners contend in their report, commenting on the case of *R. v. Benchers of Lincoln's Inn*; nor is the weight of their authority lessened, when we read appended to that report the names of Chief Baron Pollock, Mr. Justice Wightman, and Mr. Starkie.

"That case considers the Inns of Court as placed upon the footing of other voluntary societies, with respect to the admission of members. Without presuming to question the correctness of this decision in point of law, we may be permitted to remark that, in point of expediency, the ordinary immunities of a voluntary society ought not to be allowed to any body of persons claiming to be the medium of admission into one of the learned professions. If the body is to enjoy this privilege, it is no longer a private association, but one in which the public has a deep interest, and the proceedings of which, if not adapted to the purposes of general utility, ought to be made so by the interposition of law."

Even at the risk of being sneered at as optimists, of cherishing sanguine hopes, and a too credulous belief, we cannot refrain from expressing our firm conviction that permanent good may yet result to the Inns of Court from what has been hitherto a most untoward event and painful discussion. Deprecating in the best of men irresponsible government and uncontrollable power, we rejoice to think that the Judges will recognise, in the present case, a fit opportunity for applying that salutary check, which, as Visitors, they have been proved to possess; and will provide security for the future, and amnesty for the past. A stimulus will be given to the great cause of legal education, so long and cruelly neglected, and made with too much reason a matter of bitter reproach upon all connected with the law. The nature of the trust having been scrutinised, we shall again see the object of it fulfilled in public lectures—in faculties of law—in examinations for the Bar—in rewards for the studious—in encouragement to the deserving. And as affects the Masters of the Bench, sure are we that their good wishes and right feeling will obtain the mastery when they associate in their ranks, and offer the right hand of fellowship to a gentleman, lawyer, and scholar.

SELECTION OF ADJUDGED POINTS

REPORTED SINCE 1ST FEBRUARY, 1846.

POINTS IN COMMON LAW, p. 209—224.

POINTS IN EQUITY, p. 224—232.

POINTS IN THE LAW OF PROPERTY, 232—242.

POINTS IN THE LAW OF DEBTOR AND CREDITOR, 242—248.

COURTS.

L. C. of Ireland - - -
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V. C. Wigram - - -
Queen's Bench - - -

REPORTERS.

Drury & Warren. Vol. 5. part 2.
Simons. Vol. 13. part 4.
Collier. Vol 2. part 1.
Hare. Vol. 4. part 3.
Q. B. Rep. Vol. 5. part 5.; and Vol. 6.
part I. Dowling and Lowndes. Vol. 3.
part 1.
Common Bench Reports. Vol. 1. part 2.
Meeson & Welsby. Vol. 14. part 2.

I. POINTS IN COMMON LAW.

1. Bill of Lading, Action by Indorsee. 2. Coroner's Inquest. Jurisdiction.
3. Contract not avoided by Fiscal Laws. 4. Delivery Order. Principal and Agent. 5. Sheriff, Execution. 6. Foreign Copyright. 7. Conditions of a Race. 8. Policy of Assurance—Perils of the Sea. 9. Parliamentary Tax Sewer's Rate. 10. Criminal Information. 11. Prohibition. Church Rate.
12. Evidence of Bankrupt. 13—16. Pleading, Practice, and Costs.

1. THOMPSON v. DOMINY. 14 Mees. & W. 403.

Pleading—Bill of Lading—Action by Indorsee.

THE question brought to adjudication in this case was, whether the indorsee of a bill of lading could maintain an action upon it in his own name for non-delivery of goods. The defendants were the owners of the ship *Julia*, on board of which a cargo of oats had been shipped by the master of that vessel, on account of one Grant, to be carried by the defendants, and safely delivered to Grant or his assignees, he or they paying the freight. Part

of the goods had been delivered, but the defendants refused to deliver the residue, and thereupon the plaintiff brought an action against them in his own name on the bill of lading. The action evidently originated in a misapplication of the principle to be deduced from former cases. In *Lickbarrow v. Mason*¹, Ashurst J. says, "The assignee of a bill of lading trusts to the indorsement: the instrument is in its nature transferable; in this respect, therefore, this is similar to the case of a bill of exchange." In *Newsom v. Thornton*², Lord Ellenborough says, "I consider the indorsement of a bill of lading apart from all fraud, as giving the indorsee an irrevocable uncountermandable right to receive the goods; that is, when it is meant to be dealt with as an assignment of the property in the goods."

These and other authorities were accordingly relied upon in support of the action, but Mr. Baron Parke pointed out the distinction (which was quite consistent with all the precedents cited) that though a bill of lading is transferable from hand to hand, the indorsement does not transfer the *contract*, but merely the property in the goods, and added, "I never heard before of an action being brought upon it, and I think such an action quite untenable." In *Sanders v. Vauzeller*³, the Court said that on the transfer of a bill of lading, "the contract is not transferred." And, in accordance with this doctrine, the practice has always been for the transferee of a bill of lading to bring an action of trover for non-delivery of the goods, and not to declare upon the bill of lading itself. In the present case, therefore, the Court made a rule absolute for a nonsuit. Parke B. "I never heard it argued that a *contract* was transferable, except by the law merchant; and there is nothing to shew that a bill of lading is transferable under any custom of merchants. It transfers no more than the property in the goods: it does not transfer the contract." Alderson B. "This is another instance of the confusion, as Lord Ellenborough, in *Waring v. Cox*⁴, expresses it, which has arisen from 'similitudinous reasoning' upon this subject. Because in *Lickbarrow v. Mason*, a bill of lading was held to be *negotiable*, it has been contended that that instrument possesses all the properties of a bill of exchange: but it would lead to absurdity to carry the doctrine to that length. The word *negotiable* was not used in the sense in which it is used as applicable to a bill of exchange, but as passing the property in the goods only."

¹ 2 T. R. 71.² 6 East, 41.³ 4 Q. B. 297.⁴ 1 Campb. 369.

2. The QUEEN v. HINDE. 5 Q. B. 944.

Coroner's Inquest—Jurisdiction.

A body was found drowned in the river Medway, within the concurrent jurisdiction of the coroner for the city and borough of Rochester, and the deputy-coroner of the Admiralty. It was first brought to land and remained within the jurisdiction of the coroner for the county of Kent. The coroner for the city and a jury of the city proceeded to take an inquisition. All the proceedings, except viewing the body, were taken in the city; and the body was viewed in the county. The Act 6 & 7 Vict. c. 12. s. 1. enacts "That the coroner only within whose jurisdiction the body of any person upon whose death an inquest ought to be holden shall be lying dead shall hold the inquest, notwithstanding that the cause of death did not arise within the jurisdiction of such coroner; and in the case of any body found dead in the sea, or any creek, river, or navigable canal within the flowing of the sea, where there shall be no deputy-coroner for the jurisdiction of the Admiralty of *England*, the inquest shall be holden only by the coroner having jurisdiction in the place where the body shall be first brought to land. It was decided by the Court of Q. B. that the body could not be viewed for the purposes of the inquisition by the coroner and jury of the city out of their own jurisdiction; and that the inquisition should have been taken by the coroner for the county of Kent.

3. SMITH v. MANHOOD. 14 Mees. & W. 452.

Penalty—Contract not avoided by Non-compliance with Fiscal Laws.

The principle of this case was clearly established in *Johnson v. Hudson*¹, where a factor sold a parcel of prize manufactured tobacco, without having entered himself with the Excise Office as a dealer in tobacco, and without having any licence to follow that trade. It was nevertheless held that he might maintain an action against the vendee for the price, notwithstanding the tobacco was sent to him at his own desire without a permit, there being no fraud on the revenue (as the goods were prize); but at most a breach of fiscal regulations protected by penalties. In the present case the plaintiffs had committed a breach of the Excise acts by selling a large quantity of tobacco without painting their names over their door, or otherwise complying with the statutory regula-

¹ 11 East, 180.

tions imposed on manufacturers and dealers in that article: and it was argued that the plaintiffs were not entitled to recover, by reason of the sale under such circumstances being subject to a penalty, which constructively amounted to a prohibition of the contract. For this the doctrine of Lord Holt in *Bartlett v. Vinor*¹ was cited, that "a penalty implies a prohibition." Parke B. "You must show that the object of the Legislature was to prevent the contract being entered into. The argument on the other side is, that the only effect of the contract is, that the party shall pay a certain sum by way of penalty in aid of the revenue. It is quite idle to say that an enactment which requires the party to put his name of a certain length over the door of his house amounts to a prohibition of a contract in that house unless this be done. The object of the Legislature was not to prohibit a contract of sale by dealers who have not taken out a licence pursuant to the Act of Parliament. If it was, they certainly could not recover, although the prohibition was merely for the purpose of revenue. But looking at the Act of Parliament, I think its object was not to vitiate the contract itself, but only to impose a penalty on the party offending, for the purpose of the revenue. The plaintiffs, therefore, are entitled to recover upon their contract, according to the principle laid down in *Johnson v. Hudson*. I quite agree, that if it be shown that the Legislature intended to prohibit any contract, then, whether this were for the purpose of revenue or not, the contract is illegal and void, and no right of action can arise out of it."

4. *WOOD v. TASSELL.* 6 Q. B. 229.

Delivery Order—Principal and Agent.

The plaintiffs bought of the defendant, and paid for two parcels of hops lying at the warehouse of one Fridd, with whom they had been deposited by the original owner, who sold them to Tassell. After the plaintiffs had paid for the hops, they were informed that the goods were in the custody of Fridd. They accordingly caused both parcels to be weighed at Fridd's, from whom, on application, they also received one of the parcels, consisting of twenty-six bags. Some days after, the plaintiffs sent to Fridd's for the rest of the hops; but in the mean time they had been claimed and removed by a creditor of Tassell's vendor, the original owner. Upon this the plaintiffs brought an action against Tassell for non-delivery of the hops, and obtained a verdict; which, however, was afterwards set aside by the Court of Queen's Bench, and a new trial ordered, on the ground that Tassell had completed his contract, and that Fridd had constituted himself the depositary and agent of the

¹ Carth. 252.

plaintiffs. Lord Denman C. J. "On the facts it is clear that the plaintiffs knew the hops were lying at Fridd's to their use, and might, by applying to Fridd, have obtained the remnant now in dispute, as they had the other part. The defendant had done all that he was bound to do, and cannot be responsible for Fridd's wrongful delivery of them to another. This was the view which I took at the trial; though I was induced, by some degree of opportunity, to leave it as a question to the jury, whether the defendant ought to have given the plaintiffs a delivery order, though not expressly required in performance of his contract. We all think that I was wrong in so submitting the matter to them, and that the correct course would have been, to direct them, that, under the circumstances, Fridd held the hops as agent for the plaintiffs."

5. PLAYFAIR V. MUSGROVE. 14 Mee. & W. 239.

| Sheriff—Execution.

In *Taylor v. Cole*, 3 T. R. 292., Buller J. says, "In what cases the sheriff would be justified in expelling the party under a *feri facias*, I give no opinion; but it seems to me that when there is a tenant in possession, and the execution is against the landlord, whose term is to be sold, the tenant cannot be turned out of possession; but that is very different from the present case, where the debtor himself is in possession. In such case, I am inclined to think that the sheriff may turn him out of possession."

In the above case the complaint against the sheriff was, that, having entered into a dwelling-house under a writ of *feri facias*, and seized and sold the lease, he remained an unreasonable time afterwards in the house: to which the sheriff answered, that "the house the plaintiff speaks of was not the house of the plaintiff, inasmuch as before the return of the writ the sheriff sold the term and continued in possession of the house for the further execution of the writ."

Alderson B. "The sheriff has a right to enter the house for the purpose of executing the writ, but he has no business there beyond a reasonable time for the execution of it. He has a right to seize the debtor's property, and to sell and assign it, but he is only the conduit-pipe to transfer the right of the debtor to the purchaser; and if so, the house remained the house of the plaintiff until it was legally transferred." Rolfe B. "The sheriff has pleaded that he was justified in entering the plaintiff's dwelling-house by the writ of *feri facias*; and that before the return he sold the lease and the plaintiff's interest in the term, and continued in possession of the dwelling-house for the further execution of

the writ. Now the word 'sold' seems to me to mean 'bargained and sold,' for the law knows nothing of the sale of a chattel real, except by an instrument under seal, and the mere knocking it down at an auction is nothing more than making a contract to sell it. The dictum of Buller J. in *Taylor v. Cole* was unnecessary to the decision of that case, and it is not stated with much confidence."

6. *CHAPPELL V. PURDAY.* 14 Mee. & Wels. 303.

Foreign Copyright.

In this case Pollock C. B. has laid down, neatly and concisely, the law as it relates to Foreign Copyright. The learned judge reviewed the principal cases on the subject, and we readily extract a portion of the judgment. "Two questions of importance were raised in the course of the argument. The first is, whether, at Common Law, a foreigner, residing abroad, and composing a work, has a copyright in England. The second is, whether such foreign author, or his assignee, has such a right by virtue of the English statutes. Upon the first question we do not feel any difficulty; and we are of opinion that a foreign author, residing abroad and publishing a work there, has not, by the common law of England, any copyright here. A copyright is the exclusive right of multiplying copies of an original work or composition, and consequently preventing others from so doing. The general question, whether there was such a right at Common Law, was elaborately discussed in the great cases of *Millar v. Taylor*, 4 Burr. 2303., and *Donaldson v. Beckett*, Id. 2408. ; 2 Bro. P. C. 129. In *Millar v. Taylor*, it was decided by Lord Mansfield, Mr. Justice Aston, and Mr. Justice Willes, that at Common Law such a right existed, and the judgment was given for the plaintiff; and in *Donaldson v. Beckett*, which was an injunction founded upon the judgment in *Millar v. Taylor*, the majority of the judges held that such a common-law right existed; but the majority also held that it was taken away by the statute of Anne. We are, however, all of opinion that no such right exists in a foreigner at the Common Law, but that it is the creature of the Municipal Law of each country, and that in England it is altogether governed by the statutes which have been passed to create and regulate it, as in France it must be governed by the law of that country; but such a law has no extra-territorial power, and cannot be enforced beyond the limits of the state. Admitting, therefore, that by the law of France no one can, against or without the consent of the author, make or print any copy of his work, at any time or in any place, no right can be claimed in

this country as founded upon such a law; nor can any right be claimed here, except what can be supported by the law of this country. The subjects of this country are not bound to obey such a law of France, nor the courts of this country to enforce it. It follows that a British subject may, at the Common Law, freely print and publish in Great Britain any number of copies of a French work without being exposed to an action at the suit of the French author, whose exclusive privilege, founded upon the French law, is limited by the French territory; and indeed, if this were not so, the attempt to establish international copyright by treaty would have been altogether unnecessary. A foreign author having, therefore, by the Common Law, no exclusive right in this country, the only remaining question is, whether he has such a right by the statute law, and this depends on the construction of the statutes relating to literary copyright which were in force at the time of the transaction in question, namely, the 8 Anne, c. 19., and 54 Geo. 3. c. 136. If a judicial construction had been put upon these statutes by a direct and deliberate decision of any court, we should feel bound by it; but, supposing for the present that there is no such decision, and that the question comes now to be considered for the first time, we should feel no difficulty as to the proper construction to be put upon these statutes. They were passed for the encouragement of learning and the arts, by insuring to authors, artists, and inventors, the reward of their labours. In their language the acts are general; but *prima facie* it must be intended that a British legislature means only to protect British subjects, and to foster and encourage British industry and talent; and therefore, when statutes of the United Kingdom speak of authors and inventors being subjects of and residents in the United Kingdom, or at least subjects by birth or residence, and do not apply to foreigners resident abroad; and, adverting principally to the statutes of the 8 Anne and 54 Geo. 3., their provisions clearly refer to such works as are first published in Great Britain or the United Kingdom, from which first publication the time begins to run, within which an entry is (under the 2d section of the former statute, and under the 5th section of the latter) to be made at Stationers' Hall, in order to the recovery of penalties; and within twelve months after which publication, copies are to be delivered by the publisher to the British Museum and other libraries. We should therefore conclude, upon the construction of the statutes alone, that a foreign author, or the assignee of a foreign author, whether a British subject or not, had no copyright in England, and no right of action on the ground of any piracy of his work committed in the British territories. It remains to consider what

have been the decisions of our Courts upon the construction of these and other similar acts of parliament.

His Lordship then referred to the case of *Edgeberry v. Stephens*, 2 Salk. 447. ; the first case on the subject is *Clementi v. Walker*, 2 B. and C. 361. ; the next case was *Delaudre v. Shaw*, 2 Sim. 237., before the Vice Chancellor of England ; *Guichard v. Mori*, 9 Law J. Chanc. 227., before Lord Chancellor Brougham ; *Page v. Townsend*, 5 Sim. 395. ; *Bentley v. Foster*, 10 Sim. 329. ; *D'Almaine v. Boosey*, 1 Y. and C. 298.

"These are the cases on the subject : and the result seems to be, that if a foreign author, not having published abroad first, publishes in England, he may have the benefit of the statutes ; but that no case has decided that, if the author first published abroad, he can afterwards have the benefit of it by first publishing here. The 7th section of the 4 Geo. 3. c. 107. favours this construction ; for it protects against piracy by importation from abroad, those works only which are first composed, written, printed, or published in 'this kingdom ;' probably it would include the whole of the United Kingdom ; and this protection would seem to be co-extensive with the right to be thereby secured. A further argument may be derived, though perhaps not a very cogent one, from the International Copyright Act, 1 and 2 Vict. c. 89., which empowers her Majesty, by order in Council, to give to the authors of works published abroad the sole power and liberty of printing in the British dominions, for a term not exceeding that which authors, being British subjects, were then by the law entitled to, in respect of books first published within the United Kingdom. This shews the opinion of the legislature, which may assist us in interpreting the law, and it shews that, by the former statutes, a foreigner, who first published abroad, was not entitled to the protection of the act, and probably was not entitled under any circumstances. Upon the whole, then, we think it doubtful whether a foreigner, not resident here, can have an English copyright at all ; and we think he certainly cannot, if he has first published his work abroad before any publication in England."

7. *BENBOW v. JONES*, 14 Mee. and W. 193.

Conditions of a Race.

In the printed conditions of a race, it was among other things provided, that "all disputes and other matters shall be decided by the steward, whose decision shall be final, and who shall have the power of appointing an umpire. A case having arisen and been decided by the stewards, it was objected that it had not been

brought properly before the Judge. But this was overruled by the Court of Exchequer. Alderson B. "It would be very strange to say, that it is to be held that all proceedings before the steward of races are to be according to strict rules of law; that there is to be a point regularly raised by him and parties heard upon it,—I suppose by counsel,—and a formal decision after the hearing. It would next be said that the evidence must be given on oath. The truth is, the parties mean that the matter shall be subject to the decision of the steward, and that if he decides in fact, that shall be final."

8. REDMAN v. WILSON. 14 Mees. & W. 476.

Policy of Insurance—Perils of the Sea.

In this case the peril which occasioned the stranding of the ship was the result of previous negligence; and the question was, whether the loss was not, in point of law, to be attributed to the negligence, rather than to the perils of the sea, so as to exonerate the underwriters. The vessel was taking in a cargo of timber up the river at Sierra Leone, where it is usual for the natives to be employed in loading vessels; and the case suggested was, that the vessel was injured in receiving her cargo on board. When she had dropped down to Free Town, fully loaded and homeward bound, a leak was discovered. A survey took place, upon which it was decided that she could not prosecute her voyage, and part of her cargo was ordered to be discharged. On the following day there was a slight tornado: two anchors were out, but the vessel drifted two miles down the river. She was brought back, and part of her cargo was discharged; but the leak increased, and on a second examination she was pronounced unseaworthy, and *she was run ashore*, in order to prevent her from sinking in the river. She was ultimately sold, as not being fit to repair; and the assured now claimed as for a constructive total loss. The jury found that the ship was lost by perils of the sea; and this verdict was sustained by the Court of Exchequer. Parke B. "It appears to us that the rule *causa proxima non remota spectatur* applies to this case, and that the immediate cause of loss was a peril of the sea; for the stranding was a loss by a peril of the sea: and if it be said that it was voluntary, it was only to avoid the sinking of the vessel, which would have been a peril of the same sort. In *Walker v. Maitland*¹, recognised and acted upon in *Bishop v. Pentland*², it

¹ 5 B. & Ald. 171.

² 7 B & C. 219.

was decided that the underwriters on a policy of insurance are liable for a loss arising *immediately* from a peril insured against, but remotely arising from the negligence of the master and mariners: and we cannot distinguish between the negligence of the master and mariners, and the negligence of the natives (if they were negligent, and remotely gave occasion to the loss), who were employed to put the cargo on board."

9. PALMER v. EARITH. 14] Mees. & W. 428.

Parliamentary Tax—Sewers Rate.

In the debate on the case of Brewster v. Kitchell¹, it was laid down by the Lord C. J. Holt, that "the word *taxes*, generally spoken with reference to a freehold, or where the subject matter will bear it, shall be intended parliamentary taxes *propter excellentiam*. But there be *other* taxes not parliamentary, as repair of churches, commission of sewers; for any imposition which takes away part of a man's goods or rent is a tax." Here the plaintiff, Palmer, became tenant to Earith of a house in Goswell Street, under an agreement containing the following clause:—"All taxes, parochial and parliamentary, to be paid by the tenant." Palmer tendered his rent, less fifteen shillings deducted for the sewers rate, which he had previously paid. Earith refused the amount tendered, and distrained upon the plaintiff's goods; whereupon Palmer brought the present action in trespass for breaking and entering the plaintiff's house and shop, and seizing his goods: and the Court of Exchequer held that the action well lay. Parke, B. "It is quite clear, on the authority of Lord Holt, in Brewster v. Kitchell, that sewers rates are not to be considered as parliamentary taxes. A parliamentary tax is one that is imposed *directly* by authority of parliament. The tenant (Palmer) was under no obligation to pay the whole rent without deduction, and at the time of the distress he tendered enough."

10. Ex parte The DUKE OF MARLBOROUGH. 5 Q. B. 955.

Criminal Information.

From the judgment in this case we make the following extract:—

Lord Denman, C. J. "It is clear, upon all the authorities, that words merely spoken are not the subject of a criminal information. The exception is in those cases where the words

amount to a provocation to break the peace, by their inciting either to personal violence or to a challenge. We have, however, felt some doubt as to that charge which imputes corruption in the character of a magistrate. As to this, the denial on the part of the Duke is conclusive. But we find no precedent for granting a criminal information in such a case. It has often been said that the Court will not interfere, except when the words are uttered at the time when the magistrate is performing his duty: and the reason of that exception is, that there a direct obstruction is created to the course of justice. The magistrate, in such a case, may treat the words as a contempt; but, in my opinion, it is then far more expedient that this Court should interpose. There is no case that directly decides that this Court will interfere in the case of a charge orally made against a magistrate in that character. Mr. Starkie, in his "*Treatise on the Law of Slander and Libel*", published in 1830, after stating that abusive and defamatory words spoken of justices of the peace in their absence, which do not relate to the execution of their office, are not indictable, adds: — "But the case might fall under a very different consideration if a magistrate were to be charged with some specific act of oppression or corruption in his judicial capacity." That, however, is no more than an opinion doubtfully expressed, and does not appear to be founded on any authority. I expected that the Solicitor General would comment upon the cases in which interference under these circumstances has been refused, and would refer us to some authority upon which we could now act as he requires. That has not been done; and the only reason is, that no such authority exists even as a dictum or opinion. It is perfectly clear that we could not grant this information without creating a precedent; and this we ought not to do where a known course has been proceeded in for many years, unless we felt perfectly clear that the law would warrant us in so doing. And there is another principle, independent of this, which makes us unwilling to treat mere words as affording ground for a criminal information. Words may be so differently understood, and the circumstances under which they are uttered may supply so many opportunities of explanation, that we must feel most reluctant to act on what must depend so much upon oral evidence. We therefore ought not to depart from the established principles: such a departure might lead to a long inquiry conducted in a most inconvenient way." — *Patteson, Williams, and Wightman, Justices, concurred.*

¹ Vol. ii. pp. 199, 200. (Second edition.)

FRANCIS V. STEWARD, 5 Q. B. 984.

Prohibition—Church Rate. †

A citation issued from the Arches Court of Canterbury against the plaintiff (a parishioner), for "having wilfully and contumaciously obstructed, or at least refused to make or join, or concur in the making of a sufficient levy, rate, or assessment, for providing funds in order to defray the expense of the necessary repairs of the parish church (including the chancel, which, by the custom of Norwich, the parishioners are bound to repair)," &c. The plaintiff appeared in the Arches Court by his proctor, but under protest that it did not appear by the citation that he had been guilty of, or was charged with any ecclesiastical offence cognizable by that Court, or any other Ecclesiastical Court. That by the citation it did not appear that the parish church ever was, or then was, in want of any repairs whatever; or that any vestry for making any rate to defray the expense of any such repairs had been duly or at all called or held; or that the now plaintiff was ever present in any vestry in the said parish when such rate, or any rate for the repair of the said church was ever proposed or considered, or that he ever took any part whatever in the proceedings of any such vestry. That it was not competent for any person to promote the office of the Judge, or otherwise to proceed criminally against any one or more individual parishioners or inhabitants of a parish for or in respect of the acts, measures, or things, charged or alleged against the now plaintiff in the said citation. And that the now plaintiff was not bound to appear in the said cause or business to the said citation. Sir H. J. Fust overruled the protest, and directed the plaintiff to appear absolutely; whereupon the plaintiff applied to the Court of Queen's Bench for a writ of prohibition to Sir H. J. Fust, inhibiting him from proceeding further in the said cause against the now plaintiff. There was a demurrer by the defendant. Lord Denman, C. J., in giving judgment for the plaintiff, said: "Upon the whole, we think ourselves bound to pronounce the citation bad, as describing no spiritual offence. And we think it much better for the party to apply for prohibition in the first stage, than after expense incurred."

UDAL V. WALTON, 14 M. & W. 254.

Evidence of Bankrupt.

An interpleader issue was tried before Pollock, C. B., at the Gloucester assizes, 1845, in which the question was, whether

certain goods belonged to the plaintiff as assignees, as against and free from the defendant's execution. The plaintiff tendered the bankrupt Innes as a witness, to prove the petitioning creditor's debt on which the fiat issued. This was objected to; but on the point coming before the full Court, the evidence was admitted. "I have no doubt," said Pollock, C. B., "that the evidence of the bankrupt was properly received. His testimony was tendered not to support the commission (fiat), but to prove the petitioning creditor's debt. The question, therefore, as to his competency to support the commission does not arise; he clearly is competent to prove collateral facts, and in truth the point was given up on the argument."—See 6 & 7 Vic. c. 85.

JEFFREYS V. EVANS. 3 Dowl. & Lowndes, 52.

Practice—Attorney—Bill of Costs.

In this case the plaintiff was the attorney of the defendant, and sued him on a promissory note given by him for previous costs, and also for the future costs of the plaintiff as such attorney. The defendant pleaded that the note was given for the fees in question, and that the action was brought before the delivery of any signed bill, pursuant to the Act 6 & 7 Vic. c. 73. §. 37.¹ The plaintiff demurred to this plea; in support of which it was argued, that the plaintiff was in truth maintaining an action for the recovery of his fees, charges, and disbursements. Pollock, C. B.—"No: he is only suing on the security given to him, and which must be considered as given to him on account: when this bill is taxed, and the whole account taken, these securities will be set off." "Instead of pleading, the defendant should have applied to tax the bill, and stay proceedings, on payment into Court of the sum found due on taxation."—Judgment for the plaintiff.

¹ This section enacts "that from and after the passing of this Act, no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges or disbursements for any business done by such attorney or solicitor, until the expiration of one month after he shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner, referring to such bill."

WILLIAMSON v. PAGE. 3 Dowl. & Lowndes, 14.

Practice—Evidence—Commission.

This cause was tried at the Liverpool Summer Assizes in 1844, and some of the evidence adduced had been taken at Belfast, under a commission which empowered the *Commissioners* to put or cause to be put additional questions, when it should appear to them to be necessary and proper. At the sittings of the commissioners, the defendant abandoned some of his cross interrogatories, and demanded that additional questions should be put; and, on the examination of his own witnesses, proposed to act in the same manner. With respect to these additional questions, the commissioners returned that the plaintiff had objected to the defendant's right to adopt such a course, and that, subject to these objections, they had proceeded with the examination of the witnesses on such additional questions. At the trial the plaintiff objected to the admissibility of the answers to these additional questions, and Mr. Justice Cresswell ruled that they could not be received. A rule nisi for a new trial, on the ground of improper rejection of the evidence in question, was afterwards obtained by the defendant, but was discharged after argument before the full Court of Common Pleas. Tindal, C. J. "In this case the commissioners had in the first instance the ordinary authority to examine the witnesses on certain interrogatories, as well on the part of the defendant as of the plaintiff: and if the matter had stopped there, they would have had no authority or discretion to put any other questions than such as were contained in those interrogatories. A further power, however, was given them by the commissioners to put or cause to be put additional questions, &c., the object being to enable the commissioners thereby to elucidate the difficulties which might arise *pro re natâ*. It is clear, therefore, that the commissioners had a discretion, and the question is whether they have exercised it? It appears to me that they have not come to any judgment or decision upon the subject, but have left it to the Court to say whether the questions ought to have been put or not. It is the parties' own act that these commissioners were appointed. It was not necessary in point of form that the questions should have been put by the commissioners themselves: if they had adopted them when suggested by the agents for the parties on either side, that would have been a virtual compliance with the power given by the commission. The commissioners, however, do not say that the questions shall be put or that they shall not be put, but that, subject to the objections made, the examination

shall be proceeded with. They had no right to reserve for our consideration the propriety of putting these questions; and therefore the answers could not be given in evidence [at the trial], and the verdict ought to stand."

SMITH v. GOTT. 3 Dowl. & Lowndes, 47.

Practice—Arbitrator—Examination of Witnesses on Oath.

This cause had been referred by a Judge's order, which directed that the arbitrators or umpire should be "*at liberty* (if they shall think fit) to examine the parties and their respective witnesses on oath:" and the defendant had obtained a rule nisi to set aside the award, on the ground that he, in the course of the reference, required the arbitrators to take the evidence of the witnesses on oath, but that they refused to do so. Cause having been shown, it was argued in support of the rule, that the order of reference might perhaps in terms appear to give the arbitrators an option; but that its real meaning was, that so far as the witnesses were concerned, it was obligatory on the arbitrators to take the examination on oath. Parke, B. "No. The order of reference clearly leaves it in the option of the arbitrators, and although one side required the witnesses to be sworn, yet the other did not. I am, therefore, of opinion, that the arbitrators were not bound to examine the witnesses on oath. If it had been intended to make it imperative on them, the order of reference should have been drawn up accordingly, and should have stated that the arbitrators should examine, &c. The rule must be discharged, with costs."

TURNER v. LAMB. 14 Mees. & W. 412.

Pleading—Action on Covenant in Lease.

This was an action by lessor against lessee for a breach of covenant in not repairing the demised property; and the declaration omitted to state the term for which the premises were demised. The defendant demurred specially on this ground; and though no judgment was given on the point, the observations made by the learned Judges in the course of the argument are well worthy of attention. The principal authority noticed in the discussion was *Vivian v. Champion*¹, where, in an action by the heir on the demise of his ancestor, the declaration assigned as a breach, that on the 1st of April, 3d Anne, and for ten years before then, the premises were out of repair: and Lord Holt said, "If the premises were out of repair in the time of the ancestor, and so continued in the time of

¹ 1 Salk. 141.

the heir, it is a damage to the heir: the jury give as much in damages as will put the premises in repair: but hereby no damages are given in respect of the length of time they continued in decay, but in respect of what it will cost at the time of the action brought to put the premises in repair; therefore *per decem annos* was frivolous." It was contended in support of the declaration in the present case, that it was conformable to Mr. Chitty's precedent, and to the directions contained in Mr. Serjeant Williams's note to *Thursby v. Plant*¹: and it was hence argued, that it was not necessary in all cases to state the length of the term. Parke B. — "No, certainly not, except where the quantum of damage may depend on the length of the term. . . . Surely the jury ought to see on the face of the record what it is they are to give damages for. If the passage from Lord Holt's judgment be correct, it seems to show that the damages must be the same in all cases: but surely there must be a difference between a term of one year and twenty years, or between an estate for life and an estate for years. I do not give any decided judgment on the case, but the point seems to be worthy of consideration. Both parties had better amend." Alderson B. — "The damage by non-repair may surely be very different if the reversion comes to the landlord in six months, or in 900 years. Lord Holt's doctrine would startle any man to whom the proposition was stated." Pursuant to Mr. Baron Parke's suggestion, the plaintiff agreed to amend by stating the term: and the defendant agreed to withdraw his demurrer, and plead to the amended declaration.

II. POINTS IN EQUITY.

1. Executor. Contingent Debt — Indemnity. 2. Gambling — Public Policy.
3. Vendor and Purchaser — Trustee of Term. 4. Partnership — Dissolution. 5—7. Discovery — Production of Documents, and Practice.

1. SHADBOLT V. WOODFALL. 2 Coll., 30.

Executor — Contingent Debt — Indemnity.

The general rule is perfectly well known, that an executor must take care to discharge every debt of the testator before he satisfies any description of legacy: and there is no distinction in this respect in favour of specific legacies. There is often, however, great prac-

¹ 1 Saund. 230 b.

tial difficulties with respect to *contingent* debts, such as bonds not yet forfeited, or covenants still unbroken, which may nevertheless be forfeited or broken at a future time. As to these, the rule of administration in equity is, that an executor is entitled to an indemnity from legatees before he can be required to pay or deliver possession of the legacies. In Queen Elizabeth's time, in the case of *Nector v. Gennet*¹, the Court of King's Bench was of opinion, that the executor was compellable to pay a legacy in preference to a statute or obligation not forfeited: "for peradventure it shall never be forfeited, and may be *in perpetuum*, and so no will should be performed." The principle, however, of the existing rule was not declared until the time of Lord Hardwicke; who, in *Hawkins v. Day*², said: "I think all payments of simple contract debts made before breach of the condition in a bond are good; *but not of legacies.*"

This principle was accordingly followed by Sir William Grant, M. R., in *Simmons v. Bolland*.³ There the executors, after transferring to the residuary legatee the principal part of the personal estate, retained in their possession 800*l.* 5 per cent. stock, to answer the contingent forfeiture of a bond which the testator had executed and delivered to the corporation of Canterbury. The residuary legatee filed his bill against the executor for the transfer of the stock in question. And the whole question was ably argued by Sir Samuel Romilly for the plaintiff. Sir William Grant, M. R. (after reviewing the authorities). "In this state of the authorities it would be too much for me to order the executor to transfer and pay, without having security given him in case of judgment being recovered against him at law, for any future breach of the covenant. No decree that I can make will bind the corporation of Canterbury, or protect the executor against their demand, if the bond should hereafter be forfeited. All that I can do is to order the funds to be made over, on the plaintiff giving a sufficient indemnity; and it must be referred to the Master to settle the terms of such security."

The same point arose, and was similarly decided by the Court of King's Bench in Ireland, in the year 1831, in the case of *Pearson v. Archdeaken*⁴, which was an action of covenant brought by the assignee of a reversion against an administrator *debonis non*, with the will annexed for breaches of covenant contained in a lease made to the testator. The breaches assigned were for non-payment of rent and non-repair. The testator had died more than

¹ Cro. Eliz. 466.

² 3 Mer. 547.

³ Amb. 160.

⁴ Alcock and Nap. 23.

twenty years before the action was brought, but the breaches had occurred within the last four years. The defendant pleaded *plene administravit*, and issue was taken thereon. At the trial the plaintiff proved that assets to the amount of 1000*l.* had been received by the defendant between the years 1822 and 1824. The defendant proved that he had paid those assets over to a legatee, and that the testator had sold his interest in the lease twenty-four years ago to a person who till within the last four years had paid rent to the plaintiff. Under the direction of the learned Chief Justice Bushe, who was of opinion that the payment of legacies was no answer to the plaintiff's demand, the jury to find a verdict for the plaintiff: and the Court of King's Bench afterwards, on cause shown, discharged a rule which had been granted for setting aside the verdict.

Bushe, C. J., in delivering judgment, observed, that "the plaintiff's right to recover is established as a legal right, and no case has been cited to shew that such a defence is available to a personal representative in a court of law. On the contrary, notwithstanding some dicta, it appears from many cases in equity, that such a defence would not be available in equity, against the plaintiff's demand; payment of legacies being considered there as no answer to the claims of creditors. If, then, the defendant would have no equity in the Court of Chancery against this demand, upon what principle can it be supposed that the defence can be available in this Court? All cases of this kind are cases of hardship, and this is very particularly so; but that hardship is out of the reach of a Court of Law, and the law must take its course." In like manner, in *Cochrane v. Robinson*¹, where leasehold estates of which the executor and trustee of the will had never had possession, were sold under the decree of the Court, the executor notwithstanding claimed an indemnity out of the testator's personal estate against the rents and covenants reserved and contained in the leases; and the present Vice-Chancellor of England decided that the executor was entitled to be indemnified, and referred it to the Master to approve of the security. Vice-Chancellor Wigram acted on the same principle in *Fletcher v. Stevenson*², where the testator was one of the joint lessees of certain iron works in Lancashire, for a term of which eleven years were unexpired. The lease contained several onerous covenants, and as the testator's estate became at his death virtually a security to the lessor, Lord Balcarras, for the performance of the covenants by the co-lessees, the executors applied to his Lordship to release the

¹ 11 Sim. 378.

² 3 Hare, 360.

testator's estate from the covenants; but the arrangement could not be effected. The testator had bequeathed his residuary property to his widow for life, with remainders over. The widow could not give security satisfactory to the Court to refund any payments made to her on account of her income, and the whole corpus of the residue was not a sufficient security for the possible demands to which the estate was liable under the covenants in the lease. His Honour therefore decided that the interest as well as the principal of the residuary estate must be retained to answer any such demands, until the extent of the liability could be ascertained; and that if any part of the interest should be paid to the tenant for life, it could only be done on security to refund the same, if required to satisfy any such future demands. In the case of *Shadbolt v. Woodfall*, however, which is now before us, the executors had taken the imprudent step of *assenting* unconditionally to a specific bequest of leasehold estates; and a question arose whether, under such circumstances, they were entitled to an indemnity out of the testator's general estate in respect of the covenants contained in the leases. Knight Bruce V. C. "If an executor assents unconditionally to a specific bequest of leaseholds, he can require no indemnity from the residuary legatees."

2. ANON. 13 Sim. 513.

Gambling—Public Policy.

In this case the plaintiff had given to B., one of the defendants, some promissory notes; and the bill stated that the notes were made under a threat from all the defendants to accuse the plaintiff (falsely, as he alleged,) of having cheated B. at cards, and to sue him for penalties under the statute 9 Anne, c. 14. s. 5. The bill therefore prayed that the notes might be delivered up. The answer stated that the plaintiff had cheated B. by using false or cut cards, and that he consented to give the notes because he knew that he had done so. At the hearing it was contended by the defendants, that the nature of the case was altogether such that the Court would not interfere: and the language of Holt C. J. in *Bartlett v. Vinor*, as quoted by Lord Cottenham in *Ewing v. Osbaldiston*¹, was relied upon, viz. that every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender: because a penalty implies a

¹ 2 Myl. & Cr. 85.

prohibition, though there are no prohibitory words in the statute. The Vice-Chancellor of England. "The bill states, in effect, that the plaintiff was induced to give the notes in consequence of his fears being wrought upon by the representations of B.; who in his answer does not flinch from that statement, but admits that he thought it right to punish the plaintiff for what he had done: that is, to be an arbitrator in his own cause, and determine, for himself, what amount of penalty the plaintiff ought to pay for his, B.'s, benefit. If B. could have recovered the penalties at law, he was at liberty to do so: but it appears to me, that it would be extremely dangerous to allow a party to be a judge in his own cause, and to determine in his own favour what amount of penalty ought to be paid for a breach of the law committed by another person, notwithstanding he may have suffered by it. I think, therefore, that there is quite enough stated in B.'s answer, to entitle the plaintiff to a decree according to the prayer of his bill, with costs."

3. HAMPSHIRE v. BRADLEY. 2 Coll. 34.

Vendor and Purchaser—Trustee of Term refusing to assign.

On the purchase of an estate by one Birkley, he took a conveyance to himself to uses to bear dower; and an outstanding term of 1000 years was assigned to Bradley his solicitor, in trust for Birkley, his heirs or assigns, and to be disposed of as he or they should direct or appoint, and in the meantime to attend the reversion, &c. Birkley afterwards mortgaged the premises to Hampshire in fee, with a power of sale, in which it was provided that the production of the mortgage deed should be conclusive evidence of the mortgager's default; and Bradley acted as the solicitor on that occasion. He was also a party to the mortgage deed, which contained a declaration that he should hold the term in trust for securing repayment to Hampshire of the mortgage money; and subject thereto, in trust for Birkley, *his heirs, executors, and administrators, and to be assigned and disposed of as he or they might direct.* Hampshire, the mortgagee, in exercise of his power, sold the property to one Walker; and in the draft of the conveyance Bradley was made a party for the purpose of assigning the term. He objected to the draft, and refused to sign the deed, on the ground that Birkley was no party to the deed, and that it would be a breach of trust to assign the term without Birkley's direction or consent. A bill was then filed against Bradley to compel him to assign the term. Knight Bruce V. C. "The question is,

whether a solicitor shall assign a term as trustee in as plain and simple a case as can occur. . . . I am of opinion that the defendant must be decreed to execute the deed, and to pay all the costs of the suit."

4. BAILEY V. FORD. 13 Sim. 495.

Partnership—Dissolution—Motion.

Although it is the general rule of the Court of Chancery not to make an interlocutory order which would have the effect of anticipating the decree to be made at the hearing, yet this practice will be departed from in a case of urgent necessity, where an adherence to the rule would be productive of substantial injury to the parties. In the present case, accordingly, which was a suit for the dissolution of a partnership, the Court made an order upon motion for a receiver, to sell the business, collect the debts, and satisfy the demands against the concern. It appeared from the pleadings that the partnership was formed for the term of twenty-one years, and had existed for four years, that it was completely insolvent, and that its embarrassments were daily increasing. It was objected, that the order sought was in effect a decree for a dissolution, which could not be made until the hearing. The Vice Chancellor of England. "Although the general rule is, that the Court will not grant on motion that relief which ought to be granted at the hearing, yet it will do so in some cases. It appears that the affairs of the partnership are daily growing worse. And there is no reason to infer, from what is stated in the defendant's answer, that they will ever improve. Under these circumstances I shall make an order in terms of the notice of motion."

5. ATTORNEY GENERAL V. BERRY. 2 Coll. 33.

Discovery—Production of Documents.

In all ordinary cases of pleading in Equity, the defendant's answer (presuming it to be technically sufficient) is conclusive as to the amount of discovery which the plaintiff can obtain upon the record as it stands: and if further discovery is desired, the bill must be amended and fresh interrogatories inserted. In accordance with this rule the utmost credit is given to the defendant's oath touching the extent of the discovery which any document admitted by him to be in his possession will supply. Thus, if he denies that a book (such as a ledger) contains any matter relative to the subject of the suit, except in certain specified pages, he is

allowed to seal up all but the excepted pages, before he submits the book to the inspection of the plaintiff. It seems reasonable, however, that in the case of a document of a public nature, and one moreover of which the plaintiffs, independently of the suit, have an *à priori* right to the inspection, a different practice should prevail; and the present case appears to proceed on this ground. The suit was for the administration of a parochial charity: and the informants charged that the defendants and their predecessors, churchwardens and overseers of the parish, and as such, trustees of the charity, had mixed up the funds of the charity with the parish moneys; and that they had in their possession divers documents from which the truth of the charge would appear, and from which also the names would appear of the persons who had previously been the churchwardens and overseers of the parish. The defendants admitted the possession of two books called the churchwardens' book and the general overseer's account book, but denied that these books related to the matters of the suit, and also denied, to the best of their knowledge and belief, that it would appear from such books who had been churchwardens and overseers of the parish. The usual motion having been made for the production of the books in question, the defendants opposed the application, and relied upon their answer as disentitling the relators to an inspection of the documents. Knight Bruce V. C. "The parishioners may surely see their own books. Besides, I cannot suppose that the books do not shew who have been churchwardens and overseers."

6. RICE v. GORDON, 13 SIM. 580.

Practice in Equity — Production of Documents — Perjury.

In this case the common motion was made for the production of documents which the defendant by his answer had admitted to be in his possession. The motion was opposed by the defendant, on the ground that the discovery of the documents would tend to support an indictment which had been preferred against him for perjury *in the cause*; and he relied on *Paxton v. Douglas*¹, where Lord Eldon decided that a defendant was not bound to make any discovery having *a tendency* to criminate him. The Vice Chancellor of England said that in *Paxton v. Douglas* the offence was committed *prior to the institution of the suit*; but in the present case it was committed *in the very cause* in which the motion was

¹ 16 Ves. 239.

made; and that, if the Court were to refuse the motion, it would be holding out an inducement to a defendant to commit perjury in an early stage of a cause, in order to prevent the Court from administering justice in the suit. His Honour therefore made the usual order for the production of the documents.

7. CROFT v. WATERTON. WATERTON v. CROFT. 13 SIM. 653.

Practice in Equity—Administrator ad litem.

On the death of Ann Waterton, one Birmingham became her general administrator, and on his death the plaintiffs, who were two of Anne Waterton's creditors, obtained a grant of administration *ad litem* of her effects. As creditors they were plaintiffs in the first suit, which was the ordinary creditor's suit for an account and distribution of her assets. As administrators *ad litem* they were defendants in the second suit. Both causes came on to be heard together, and it was then objected that no administration of Anne Waterton's general assets could take place, unless a general administrator were before the Court. The Vice Chancellor of England. "In my opinion, the objection founded on the limited nature of the letters of administration which have been granted to the Messrs. Croft must be allowed; for if, at any future period, general letters of administration to Anne Waterton are taken out, the person to whom they are granted will not be bound by any of the proceedings in this suit. Now, one of the objects which the Messrs. Croft seek to obtain, is to have certain property, which is in the possession of Robert Waterton, one of the defendants in the first suit and the plaintiff in the second suit, accounted for, and applied as part of the assets of Ann Waterton. Robert Waterton, however, contends, as I understand, that that property does not form part of the assets of Ann Waterton, but belongs to himself: and if I should so decide, and the general administrator should be dissatisfied with my decision, there would be nothing to prevent him from instituting a new suit for the purpose of having the question determined a second time. On the other hand, if I were to hold that the property formed part of the assets of Ann Waterton, and were to direct an account to be taken of it, the general administrator might, if he pleased, file a new bill for the purpose of having the account taken over again. For these reasons I think that the causes now before me are defective; and I shall order them to stand over, with liberty to the plaintiffs to add parties as they may be advised."

III. POINTS IN THE LAW OF PROPERTY.

1. *Donatio mortis causa*—Spiritual Influence of Priests. 2—4. Powers of leasing and Execution of Powers. 5. Statute of Uses—Active Trust.
6. Marriage Settlement—Raising of Portions.

1. THOMPSON V. HEFFERMAN. 4 Dru. & Warr. 285.

Donatio mortis causa—Spiritual Influence of Priests.

In this case the Court decided that the alleged *donatio mortis causa* was unsustainable, by reason of the money, which was the subject of the gift, not having been actually handed over to the donee at the time when the gift was asserted to have been made. But the more material part of the case consisted in the relation in which the parties stood towards each other. The intestate, Thompson, was much advanced in years, and the defendant was a Roman Catholic priest, who attended him in his last illness, and who, immediately after Thompson's death, possessed himself of all the intestate's money and household property, upon an allegation that the intestate had previously to his death given the same to him as a *donatio mortis causa*. The bill was filed by the administrator to obtain possession of the property; and a decree to that effect was made by the Court. The spiritual ascendancy, however, which, the defendant's position gave him over the deceased, was the main topic of comment by the Court: and but for this feature of the case, it contains little to require from us a lengthened notice of it. Gifts made under such influence are treated by Courts of Equity upon the same principles as beneficial gifts from a ward to his guardian, or from a client to his attorney: and the presumption of undue influence is in these cases so strong, that nothing but the most complete and satisfactory evidence can overcome it. With respect to clerical influence, the cases in the books are extremely few: but when such a case arose in the person of a clergyman of the Church of England, the principle was ably stated by Sir Samuel Romilly in his celebrated argument in *Huguenin v. Baseley*¹, the report of which is one of the very few legal memoirs of the eloquence of that accomplished person. "What is the authority of a guardian, or even parental authority, what are the means of influence by severity or indulgence in such a relation, compared with the power of religious impressions under the ascendancy of a spiritual adviser; with such an engine to work

¹ 14 Ves. 273.

upon the passions ; to excite superstitious fears or pious hopes ; to inspire, as the object may be best promoted, despair or confidence ; to alarm the conscience by the horrors of eternal misery, or support the drooping spirits by unfolding the prospect of eternal happiness ; that good or evil, which is never to end ? What are all other means to these ? Are inferior considerations to have so much effect ; and is no regard to be given to the most powerful motive that can actuate the human mind ? Though no direct authority is produced, your Lordship, dispensing justice by the same rule as your predecessors upon such a subject, not confined within the narrow limits of precedent, will, as a new relation appears, look into the principles that govern the human heart, and decide in a case, far the strongest that has yet occurred, upon this ground alone, from its infinite importance to the community." From the foregoing extract it will be seen that Sir Samuel Romilly considered the case wholly new and without precedent, and only referable to the general principles of equitable jurisdiction. Lord Eldon also seems to have been unacquainted with a very remarkable case of *Norton v. Relly*¹, which was decided in 1764, upon similar principles, by Lord Chancellor Henley, a Judge who was accustomed to express himself in a very forcible and even impassioned manner upon the bench. The bill in that case was filed by a maiden lady, named Norton, residing at Leeds, against the defendant Relly, a methodist preacher, and other trustees named in a deed of gift, whereby an annuity of 50*l.* was charged by the plaintiff upon her real estate in Yorkshire for the benefit of Relly. She prayed that the deed might be delivered up to be cancelled on the ground of undue influence in obtaining it : and the Lord Chancellor so decreed. It is impossible, within our present limits, to give more than the following characteristic extract from his Lordship's judgment, the whole of which, however, will well repay the attention of the student. Lord Henley C. " This cause, as it has been very justly observed, is the first of the kind that ever came before this Court, and, I may add, before any Court of Judicature in this kingdom. Matters of religion are, happily, very rarely matters of dispute in Courts of Law or Equity. In regard to Protestant Dissenters, under which denomination it has been attempted to shelter and include the defendant Relly, no man whatever bears a greater regard and esteem for those who are really so than I do : and God forbid that in the present age the true dissenters of every kind should not be tolerated, or that the spirit of Christianity should, in this kingdom, lose the spirit of moderation ! I can and do esteem the professors of one equally with our own established church, to which, not only from the pro-

¹ 2 Eden, 286.

fession of my faith, but from my principles, I bear a higher veneration. But very wide is the difference between dissenters and fanatics, whose canting and whose doctrines have no other tendency than to plunge their deluded votaries into the very abyss of bigotry, despair, and enthusiasm. And though, even against those unhappy and false pastors, I would not wish the spirit of persecution to go forth, yet are not these men to be discountenanced and discouraged whenever they properly come before the Courts of Justice?

“Men who go about, and, in the Apostle’s language, creep into people’s dwellings, deluding weak women; men who go about and diffuse their rank and warm enthusiastic notions, to the destruction not only of the temporal concerns of many of the subjects of this realm, but to the endangering their eternal welfare. And shall it be said that this Court cannot relieve against the glaring impositions of these men? that it cannot relieve the weak and unwary, especially when the impositions are exercised on those of the weaker sex? It is no by means arguing agreeably to the practice and equity of this Court to insist upon it. This Court is the guardian and protector of the weak and helpless of every denomination, and the punisher of fraud and imposition in every degree. Yes, this Court can extend its hands of protection: it has a conscience to relieve, and the constitution itself would be in danger if it did not. . . . Let it not be told in the streets of London that this preaching sectary is only defending his just rights, and must be supported in them. . . . I have considered this cause not merely as a private matter, but of public concernment and utility. . . . I have staid much beyond my time: I have given this cause a long and patient hearing: and inasmuch as the deed was obtained on circumstances of the greatest fraud, imposition, and misrepresentation that could be, let it be decreed that the defendant Relly execute a release to Mrs. Norton of this annuity, and deliver up the deed for securing it. . . and pay the costs of this suit. I cannot conclude without observing that one of his (Relly’s) counsel, with some ingenuity, tried to shelter him under the denomination of an *independent* preacher. I have tried, in the decree I have made, to spoil his independency.” From this exposition of the views of Lord Henley upon so important a topic, the reader will not be unprepared for the following strong expression of Sir E. Sugden’s opinion in the case of the Roman Catholic priest, whose conduct gave rise to the suit of *Thompson v. Hefferman*.

Lord Chancellor Sugden: “When a clergyman attends upon a person in his last moments, and sets up a gift from the dying man

to himself, the evidence of the transaction ought to be perfectly free from all suspicion, and such as to leave no reasonable doubt in the mind of the Court as to its truth. A deathbed is not the fit place, nor the proper time, at which a clergyman, of any persuasion, should look to his own personal interest, or seek to obtain the property of the dying man. On such an occasion, if a man has a testamentary intention, and time allows, proper advice should be obtained, some professional person should be sent for, and disinterested witnesses called in: all due solemnities should attend the disposition of the property. Advantage ought never to be taken of a man's last moments, in order to obtain dispositions of his property in favour of persons not connected with him by ties of blood; and I shall always require strong evidence, more especially in the case of a clergyman, before I support a gift made *in extremis*. . . . If the minister of religion at such an awful moment will desert his office, it is not only the privilege but the duty of the law to throw its protection around the individual. . . . I am of opinion that the gift was not made either by the directions or with the authority of Thompson. I have never seen a case calling for more marked disapprobation. I shall give the plaintiff a decree according to the prayer of his bill; and the defendant must pay all the costs of the suit up to the present time."

2. DOE V. BURROUGH. 6 Q. B. 229.

Power of leasing — Invalid Exercise of Power.

This case is an illustration of the well-known doctrine, that on every occasion of the exercise of a power, the strictest conformity to its terms is required. By the will of Lord Egremont, Percy Wyndham was devisee for life of certain lands, with the ordinary power of leasing upon the following terms: "so that in every of the leases so to be made and granted by virtue of the several powers aforesaid, there be contained *the usual and reasonable covenants*, and a condition of re-entry for non-payment of the rent or rents thereby reserved, in case the same be behind or unpaid by the space of twenty-one days, *and for non-performance of the covenants* therein to be contained." Percy Wyndham, as such tenant for life, granted three leases to one Guppy for ninety-nine years, determinable on lives; and Guppy covenanted to repair, with a proviso for re-entry by the lessor, in case Guppy should suffer the demised premises to run to ruin or decay for want of reparation, and should not sufficiently amend and repair the same

within six calendar months next after notice given by Percy Wyndham and his assigns. It was objected that the lessor had here taken a qualified instead of an absolute covenant. Lord Denman C. J. "We are of opinion that the lease in this case cannot be supported. The power requires that there should be a clause of re-entry for non-performance of the covenants to be contained in the lease. The lease contains a general covenant to repair and keep in repair: the clause of re-entry is in case the lessee shall not repair after six calendar months' notice. This appears to us to be clearly not a compliance with the power."

3. Doe dem. LORD EGREMONT V. STEPHENS. 6 Q. B. 208.

Power of leasing — Construction.

This case contains several practical points in conveyancing. It was an action brought to try the validity of a lease granted in 1828 by Lord Egremont as tenant for life with a power of leasing under the will of his father Sir William Wyndham. The power authorised Lord E. to demise, for years determinable on lives, *any part* of the premises *usually* so leased, by lease reserving the *ancient and accustomed rents* and heriots, and containing the *usual and reasonable covenants*, and not containing any clause *authorising the lessee to commit waste*, or exempting him from punishment for committing the same. In assumed exercise of this power a lease was granted in 1828, comprising four tenements, viz.:—Andrew's, Stone's, Crang's, Grayborough. Andrew's and Crang's were part of the estate of Sir W. Wyndham, but Stone's and Grayborough were not so, and consequently not within the power. The plaintiff's first objection to the lease therefore turned on this point; and at the argument, upon a special case reserved from the Somerset assizes, the following passage in Co. Litt. 44. b., relative to the Stat. 32 Hen. 8. c. 28. for enabling tenants in tail and others to grant leases, was relied upon. "If twenty acres of land have been accustomedly letten, and a lease is made of those twenty and of one acre which was not accustomedly letten, reserving the accustomed yearly rent and so much more as exceeds the value of the other acre, this lease is not warranted by the Act, for that the accustomed rent is not reserved, seeing part was not accustomedly letten, and the rent issueth out of the whole:" and it was argued that the difficulty is greater in a case like the present, where there are reservations of heriots, which cannot be subdivided or apportioned. Lord Denman C. J. "This objection appears to us to be very formidable. It is not merely that tenements not before

letten together had been joined at an entire rent, or that premises had been severed and divided which were before letten together at *pro rata* rents, where all were parcel of the same estate, and under the same power; but it is mixing and joining, at an entire rent, premises under the power, and others to which the power does not extend. The authorities cited, especially Lord Cardigan v. Montague in the appendix to Sugden on Powers, (Vol. II. 551. 7th ed.) Doe v. Rendle (3 M. & S. 99.), and others which are commented on in Doe v. Lock (2 A. & E. 747.), establish the position that the mere joining of strange tenements at an entire rent is fatal to the lease. And if the tenements called Stone's and Grayborough are taken to have been held in fee simple by the late Lord Egremont, there would be no ancient and accustomed rent as to them; and it is difficult to see how the small rent (14s.) reserved by the lease in question could be apportioned." Judgment for the plaintiff on this objection.

II. The second objection to this lease was, that even if all the tenements had been within the power, they had always been leased separately, and therefore had not been *usually so leased*, as now, within the meaning of the power. To this it was answered, that tenements which are all under a power may be joined and separated, *ad libitum*, provided the due proportion of rent be reserved; and Doe v. Wilson (5 B. & Ald. 363.) was relied upon. Lord Denman C.J. "We are inclined to think that the answer is sufficient; and we are of opinion that the words, *usually so leased*, relate to the time and duration of the lease, not to the joining or separating the premises."

III. The third objection to the lease was, that the authority which it gave the lessee to take down an out-house and use the materials for building a house, was contrary to the terms of the power. Lord Denman, C.J. "We think there is nothing in the third objection. Whether the taking down the out-house and using the materials to build a house, would or would not be waste, if not authorised to be done by the reversioner, we are of opinion that the contract and permission so to do is not a clause giving power to the lessee to commit waste within the meaning of the leasing power in question."

IV. The fourth objection was, that the lease did not contain the usual and reasonable covenants. The ordinary test as to what covenants are usual, is the latest lease before the will or instrument creating the power. In the lease in question there was no covenant to grind at the Lord's mill; and as to Andrew's tenement, the latest lease (which was made in 1744 by the donor of the power) appeared to contain no such covenant. But, as to

Crang's tenement, there were two leases of it in existence at the time of the creation of the power, one dated in 1700, and the other in 1757. The latter deed was lost, and the contents were unknown; but the former contained a reservation of suit at the mills, and was treated by the Court as the latest lease. The Court, therefore, sustained the objection. Lord Denman C. J. "The lease of 1700 does contain a reservation of suit at the mills, and a covenant to perform the suit so reserved. We think it impossible, therefore, to say that such covenant was not one of the usual and reasonable covenants, and then the omission of it in the lease of 1828 is fatal to the whole lease. Upon the whole, therefore, as well on the first objection as the fourth, we think the lessor of the plaintiff entitled to the judgment of the Court.

4. STACKPOOLE V. STACKPOOLE. 4 Dru. & Warr. 320.

Power — Excessive Execution — Cy près.

Mistakes in the testamentary exercise of powers are remedied in equity by a peculiar construction, from which the doctrine of *cy près* has originated. In such cases, the Court gives effect to an irregular appointment, by putting upon it a construction consistent, as far as may be, with the intention of the donor of the power, *ut res magis valeat quam pereat*; or, in the language of Vice-chancellor Wigram, "in order to preserve and effect something, which the Court collects from the will to have been the paramount object of the testator, it rejects something else, which is regarded as merely a subordinate purpose, namely, the mode of carrying out that intention."¹ This doctrine of *cy près*, or approximation, though now perfectly established, has been frequently disapproved, and has gone, Lord Kenyon observes, "to the utmost verge of the law."² Lord Eldon also said, "it is not proper to go one step farther."³ The benefit of this doctrine has accordingly never been extended to powers executed by deed, nor to powers affecting mere personalty: and in such cases an appointment under a power is void, so far as relates to the excess. In the case before us, there was a power authorising a tenant for life to appoint certain lands to his sons for estates not exceeding estates tail: and the question was, whether he could, under that power, by will (it was admitted that by deed he could not) raise an estate tail in a son, as he had attempted to do, by devising the estate to such son for life, with remainder to trustees to preserve, with remainder to his first and

¹ 3 Hare, 11, in *Vanderplank v. King*.

² *Brudenell v. Elwes*, 1 East, 451.

³ 8 C. 7 Ves. 390.

other sons in tail male. In terms, the power did not authorise an appointment to any person except the sons of the donee of the power: it neither authorised the intermediate limitation to the trustees, nor the appointment to the grandsons as purchasers. But it was argued, that although the son could not under the power take an estate for life, with remainder to his sons as purchasers, yet that, by the application of the *cy près* doctrine, that son might take an estate in tail male; and that if such an effect were given to the will, the general intent would be effectuated, and all the sons of the son, and their male issue, would take the same estates as if the power had been strictly followed. The objection to this construction was, that the adoption of it would enable the son to prevent the estate from going to his sons; for at any time he might disentail the estate, and convert himself into a tenant in fee simple. On the other hand, by rejecting that construction, the intention of the testator, in his assumed exercise of the power, would be defeated, and the estate would go away under the will creating the power to collateral branches of the family, so as to exclude his issue from all possibility of succession; whereas, by the other construction, unless the son barred the entail, the estate would descend to all the issue for whom the testator intended to provide. Under these circumstances, the Court decided in favour of the *cy près* construction. Lord Chancellor Sugden. "The rights of the parties depend upon questions of the greatest nicety and difficulty." (His Lordship then adverted to the arguments already stated.)

"The cases upon this doctrine go thus far. In *Chapman v. Brown*¹ certain words had been omitted in the will by accident. The Court of King's Bench took advantage of the omission in order to give an estate tail to the person who was capable of taking it according to the rules of law, for whom it would descend to the persons who would have taken by purchase, if there had been no mistake in the will. The construction which the Court adopted was ingenious, and opinions were expressed by the Judges who decided that case, that the limitations might have been supported by the application of the doctrine now contended for. This is explained by Lord Alvanley in *Routledge v. Dorrill*.² The objection to the limitations, however, was not that they were an improper execution of a power, for the devise was of an interest, but that they were void, as being contrary to the general rule of law. In *Nicholl v. Nicholl*³ the exact point arose, and a case was sent for the opinion of a Court of law. The Judges certified in

¹ 3 Burr. 1626.; 3 Bro. P. C. 269. Toml. ed.

² 2 Ves. 364, 365.

³ 2 W. Bl. 1159.

favour of the application of the *cy près* doctrine to the construction of the limitations there. This also was the devise of an estate, and not an execution of a power ; but a will executed under a power is, within the limits of the power, to have the same favourable construction as a proper will : accordingly, in *Pitt v. Jackson*¹, which depended upon the execution of a power by will, Lord Kenyon laid down the same doctrine clearly and decisively, although it ultimately appeared that it was not necessary to decide the point, either when the cause was first heard at the Rolls before Lord Kenyon, or when it subsequently, under the name of *Smith v. Lord Camelford*², came on before Lord Loughborough. The rule, however, was distinctly laid down by Lord Kenyon, who was one of the most consummate real property lawyers that ever adorned the Bench ; and he adhered to the opinion he then expressed to the latest moment of his judicial existence. I am aware that the doctrine has been questioned by authorities entitled to the highest respect, but it has never been overruled ; and it has been adopted by Lord Alvanley and other great authorities. It has been truly said, that the doctrine goes to the very verge of the law, yet no one has ventured to say that it actually breaks in upon any rule of law. In my opinion it is the soundest construction, and I think I ought to act upon that rule in this case ; I shall thus be enabled to effectuate, to a great extent, the intention of the testator, who had power to do what I now do for him. I do nothing but give effect to a disposition, which, thus construed, will unquestionably be within the limits of the testator's power, and which he could himself have framed accordingly, had he been informed what the rule of law was upon the subject. I keep within the terms of the power, and I do not exceed his intention ; and there is nothing in the nature of a power like this, as distinguished from property, which should prevent me from applying the doctrine to a devise under the power. I am therefore of opinion, that the *cy près* doctrine ought to be applied to this case, and that, by its application, the limitation in question is a valid appointment to the son *quasi* in tail male."³

5. WILLIAMS v. WATERS, 14 Mee. & Wels. 166.

Statute of Uses—Active Trust.

The words of the Statute of Uses are, "that where any person shall stand seised of any lands, &c. to the use, confidence, or trust

¹ 2 Bro. C. C. 51.

² 2 Ves. 698.

³ See *Vanderplank v. King*, 3 Hare, 1.

of any other person or persons, &c. by reason of any bargain, sale, &c. in every such case all and every such person or persons, &c. that have, or hereafter shall have, such use, confidence, or trust in fee simple, &c. shall from henceforth stand seised, &c.; and it has long been settled, that although *use* is the word generally used, that it is not the only word which will raise a use under the statute. If lands are conveyed to A. and his heirs *in trust* for B. and his heirs, or *in confidence* that he or they shall receive the rents, the use will be executed and B. will have the legal estate. *Eure v. Howard*, Pres. Cha. 345.¹

In the above case, the lands of a woman on her marriage were conveyed by lease and release by her to trustees and their heirs, to the use of the wife and her assignees until the marriage, and from the solemnization of the marriage *in trust* for her and her assigns during her life *for her sole and separate use*, independent of her intended husband, his debts, control, or enjoyment; and after the decease of the wife to the use of the intended husband, his heirs and assigns for ever, and it was held that the wife took the legal estate for her life, and not the trustees.

“Although,” said Parke B., “it is highly probable that these parties intended to give the trustees the legal estate during the life of the wife, they have not used apt words for that purpose. We cannot collect clearly from the words of the deed that they intended to give the trustees *an active trust*. The limitation to her sole use is therefore void at law, and the use is executed in the wife, although the husband is a trustee for her in equity.”

6. SHEPPARD V. WILSON. 4 Hare, 392.

Marriage Settlement — Portions — Time of raising.

By the settlement made on the marriage of T. Sheppard, real estates were limited to trustees for a term of 1000 years, in the usual manner for raising portions for the younger children of the marriage. If there should be only one child, 5000*l.* was to be raised; 8000*l.* if two children; and 10,000*l.* if three or more children; to be divided among them equally, the shares of sons to be payable at the age of twenty-one, and the shares of the daughters at that age, or marriage. The portions were also to bear interest at five per cent. for the maintenance of the younger children during minority. The eldest son, having succeeded as heir at law to the settled estates, and attained twenty-one, presented a petition in the cause, praying to be let into possession, subject to the term: and also praying that the portions provided by the settlement might be

¹ 12 East, 455.

forthwith raised and invested for the benefit of the younger children (two daughters and a son), who were all infants, and that the estates might be discharged from the trusts relating to the portions. The application was opposed on the ground that the infants ought not to be deprived of the security of the land, nor have the lower interest of 3*l.* per cent. in the funds substituted for the interest at 5*l.* per cent. payable out of the land, under the settlement. The Vice Chancellor Wigram concurred in this view, and said that the Court would not anticipate the time of payment in raising the money, or give the children an inferior security for their portions.

Afterwards, upon the marriage of the two daughters, petitions were presented, praying that their portions might be raised and paid: and thereupon the eldest son insisted that the time was come for raising 10,000*l.* in satisfaction of all the portions, and so disencumbering the estate. But this was contested on behalf of the younger son, who was still an infant, on the ground that the entire sum of 10,000*l.* would not be payable, unless all the three younger children became entitled to their portions: and the infant younger son might never attain twenty-one: and it was asked whether the heir, by raising the portions at once, intended to waive his right to satisfy them by the smaller sum in that event? The Vice Chancellor held, that it was not imperative on the trustees of the term to raise all the portions when one or two of them became payable; and that the Court would not, without necessity, direct a larger sum to be raised than was required to satisfy the portions which were actually due.

IV. POINTS IN THE LAW OF DEBTOR AND CREDITOR.

1. Insolvency — Order of Protection. 2. Right of Bankrupt to acquire Property. 3. Payment after Act of Bankruptcy. 4. Practice — Insolvency.

1. THOMAS V. HUDSON. 14 Mees. & W. 353.

Insolvency — Order of Protection — Escape.

It will be recollected that in *Parker v. Crole*¹, the following principle was established, viz., that bankruptcy and certificate constitute no bar to an action of *tort* against the bankrupt. This principle was adopted by the legislature in the late Insolvency Act, 5 & 6 Vict. c. 116., from which it appears, that though the

¹ 5 Bing. 63.

interim order of protection would operate as against all debts, not only on contracts, but also on costs, the petitioner is not entitled (a. 4.) to obtain a *final* order of discharge, unless he satisfies the commissioner that none of his debts were contracted by reason of any judgment in, amongst other actions, any action of assault. Here the plaintiff had obtained judgment against one Foulkes in an action for an assault and false imprisonment: and Foulkes, having been taken in execution under a *ca sa.*, was committed to the Queen's prison, of which the defendant was the keeper. Foulkes afterwards petitioned the Court of Bankruptcy for his discharge under the Insolvency Acts, 5 & 6. Vict. c. 116., and 7 & 8 Vict. c. 96.; and the commissioner, having made an order for his discharge, the defendant discharged Foulkes in obedience to that order. Thereupon the plaintiff brought an action against Hudson for an escape. But the Court of Exchequer held that Hudson was bound to obey the order of the Commissioner, who was acting judicially in a matter over which he had jurisdiction; and that the action did not lie. Pollock C. B.: "Suppose a special power to be conferred upon the Court of Queen's Bench, and they were to put an erroneous construction upon the Act of Parliament conferring it, and were to make an order, is the officer to be responsible for obeying it? I think not." Alderson B.: "The Commissioner has but very imperfect means of enabling him to come to a decision in these matters—nothing but the petition and affidavit; still he has these documents, and upon these he must exercise his judgment, and by that judgment all persons must be bound. The decision may be wrong: but it is a decision by the proper authority, and, if wrong, comes within the principle decided in the *Marshalsea* case¹, that orders by a competent authority, though made *inverso ordine*, are a protection to those who act under them."

2. HERBERT V. SAYER, 5 Q. B. 965.

Right of Bankrupt twice certificated to acquire Property and contract for the Benefit of his Assignees.

This was an action of assumpsit brought by the indorsee of a bill of exchange against the acceptor. The plaintiff had before the indorsement been twice a bankrupt, under a commission and under a fiat; and he had obtained his certificates under both the commission and the fiat; but his estate under the fiat was not sufficient to pay 15s. in the pound. The defendant pleaded that the bill was indorsed

¹ 1 Salk. 273.

to the plaintiff after the allowance of the last certificate, whereby the cause of action on the bill was vested in the assignees under the fiat. The plaintiff demurred to the plea that it was bad, because it did not state that the assignees under the fiat, or either of them, had interfered, or required the defendant to pay to them the amount of the bill. The Court of Queen's Bench gave judgment for the defendant on this demurrer, but, on a writ of error, the Exchequer Chamber reversed that decision, and decided that the plea was bad for not stating that the assignees had interfered and required the defendant to pay to them. The main question decided in this case was that a bankrupt twice certificated, and who has not paid 15s. in the pound, has a good right to after-acquired property, such as the bill of exchange in question in this action, against the parties to the bill, and all the world except the assignees. It was held that a bankrupt in this condition is in the same situation with respect to property acquired after a second certificate, as an uncertificated bankrupt was with respect to property acquired after the assignment before the recent statutes 6 Geo. 4. c. 16. and 1 & 2 W. 4. c. 56.; and that an uncertificated bankrupt has the same right now that he had before those statutes, namely, a right to after-acquired property against every body but the assignees, and that it is not competent for a stranger to dispute his title.

Tindal C. J. in giving judgment in the Exchequer Chamber, said, "not only the weight of authority but reason and convenience are in favour of the right of a bankrupt to sue. All future property and contracts vest in the assignees, by the words of stat. 6 G. 4. c. 16. ss. 63. 127., and by the construction put by the Courts on the words of the older statutes. But there must be property in the bankrupt, or *contracts with him*, before such property or contracts can vest in the assignees. The effect of the statutory enactments may be, either to transfer immediately such property or contracts from the bankrupt to the assignees, vesting the property in the bankrupt for an instant only, or to give the assignees the beneficial interest and to make the bankrupt acquire property or contract for their benefit only, in the nature of an agent. The cases accord with the latter construction of the statute; and it is most consistent with convenience; for otherwise there would be no protection to persons dealing with an uncertificated bankrupt. Not only would they acquire no title by purchases from him, but payments for such purchases, and for all other debts due to the uncertificated bankrupt, would be invalidated. The legislature, by several statutes, have protected all payments by and to, and all dealings and transactions with, the bankrupt *bonâ fide* made or

entered into without notice of the Act of Bankruptcy before the fiat: but there is no provision by the statute law for such payments, dealings, or transactions after the fiat; and the only way by which they can be rendered valid, and great confusion, inconvenience, and hardship prevented, is by adopting the latter construction, and holding that the bankrupt acquires property and contracts for the assignees, who may, whenever they please, disaffirm his act, but, until they do so, his acts are all valid. If, then, an uncertificated bankrupt contracts on behalf of and for the benefit of his assignees, it is perfectly clear that he may sue for such contracts in his own name; and it is no plea that the property is vested in, or the contract made for the benefit of, the assignees, unless it contains an averment that they have interfered and desired the defendant to pay to them, any more than it would be a defence to an action by a factor, broker, or agent for another, to plead that the property belonged to, or the contract was made by the plaintiff, for his principal. Such a plea, to be a good answer, must aver that the principal has interposed, or disclose some other ground of defence." In this case the defendant also pleaded, that he accepted the bill without ever having received any consideration or value, and solely for the accommodation of the drawer, in order that he might deposit it with R. as a collateral security for a debt due to him; that R. took it on those terms; that the drawer, *before the bill became due*, paid R. part of that debt and tendered the residue; that R. refused to receive the money tendered, kept the bill, and indorsed it to the plaintiff, as a mere trustee; R. and the plaintiff conspiring and colluding to cheat the defendant. The defendant replied, *de injuriâ*. The plaintiff demurred, and on this demurrer it was decided by the Court of Queen's Bench that the replication was good, the plea being in excuse, and not in discharge.

3. KYNASTON v. CROUCH. 14 M. & W. 266.

Payments after Act of Bankruptcy.

By 6 G. 4. c. 16. s. 82., all payments *bonâ fide* made by any bankrupt, or by any person in his behalf before the commission to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor,) shall be valid, notwithstanding any prior act of bankruptcy; and all payments *bonâ fide* made to any bankrupt before the commission shall be valid, notwithstanding any prior act of bankruptcy. By 2 & 3 Vict. c. 29. s. 1., it is provided that all contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made

and entered into before the fiat shall be valid, notwithstanding any prior act of bankruptcy; provided the person in dealing with the bankrupt had not, at the time of the contract, dealings, or transaction, notice of any prior act of bankruptcy.

In this case the bankrupt was a tanner, and the defendant was his servant, and attended in his shop and managed his business for him. After the bankrupt had left home (which was the act of bankruptcy), the defendant received in the shop various sums of money, some for shop-goods sold by him after the act of bankruptcy, the residue from debtors to the bankrupt, who paid the amount of their respective debts to him. The defendant made payments to various persons in the course of carrying on the business in the bankrupt's absence; some to creditors, some for the expenses of house-keeping, and smaller sums to be retained for wages due to himself; and those payments altogether equalled the sums received by him. But a part of these payments, amounting to 21*l.*, were made after the defendant had notice of the act of bankruptcy, viz. on the 9th of November. In an action by the plaintiff as assignee, for money had and received, the jury found that all the payments were *bonâ fide* made. But Maule J. thought that the defendant was liable to the assignees for all the money received by him after the act of bankruptcy, and was not entitled to take credit for any of the payments. And the Court of Exchequer was subsequently of the same opinion. "On the part of the defendant," said Parke B. "it was contended that he was not liable because he was merely the means of carrying the money from the hand of one person to another, a messenger or carrier, and fell within the principle of *Cole v. Wright*, 4 Taunt. 198, which was also adopted in the case of *Tope v. Hockin*, 7 B. & C. 110. It is clear that this principle is wholly inapplicable to the case of the shop-goods sold, if the defendant was a wrongdoer by relation. We think also that the defendant cannot be considered as a mere channel of conveyance with respect to the monies received for the goods or paid by the debtors. They were payments to him as agent to the bankrupt; but they were general payments without any direction, express or implied, to pay them over to his master. The moment the money got into the defendant's hands, the debtor was discharged, and he had no interest in any subsequent application of it, and therefore he cannot be considered as having paid it upon a special trust or direction to pay it over. As between debtor and bankrupt it was a payment to the latter; but as between the assignees who represent the bankrupt and the defendant, it was money paid to their use: and *as the defendant has not pleaded*

specially that he has paid it to the bankrupt without notice} of bankruptcy, or in any other way so as to avail himself of any defence which the statutes mitigating the effect of the harsh relation to the act of bankruptcy provided, he is liable to the action."

4. MAZEMAN V. DAVIS. 3 Dowl. and Lowndes, 145.

Practice—Insolvency—Order of Protection.

A very important point of practice was decided in this case. It seems to have been generally assumed that the interim order of protection granted to a petitioning debtor under the Insolvency Act, 7 & 8 Vict. c. 70., was capable of enlargement or extension from time to time, at the discretion of the Commissioner. In the present case the plaintiff obtained judgment against the defendant in the Queen's Bench, and issued a writ of *exigi facias* tested on the 8th July, 1845. On the 7th of the same month the defendant had petitioned the Court of Bankruptcy under the above-mentioned statute: and on the 14th the Commissioner made an order granting to the defendant a protection from arrest until the 4th October. Between the 14th July and 4th October, the defendant was arrested on the writ of *exigi facias*; but, on producing the Commissioner's order of July 14th, was forthwith liberated by the officer. On the 4th October at the expiration of the original order of protection, the Commissioner made a new order, extending the protection of the defendant until the 14th October, and subsequently made two further extensions, reaching to December 6th, 1845. On the 14th November, however, the defendant was again arrested upon a writ of *exigi facias*, at the suit of the plaintiff: but although he then produced the Commissioner's extended order of protection, the officer detained him in custody. The defendant then obtained a rule to show cause why he should not be discharged out of the sheriff's custody: but after cause shown, the arrest was held to be valid on the ground that the Commissioner had no power to make any extension or enlargement of the original order of protection.

Patteson J. "I confess I should have scarcely thought that the construction to be put upon this act admitted of any doubt, if it had not been stated that those who have to act under its provisions entertain a different opinion. I have therefore considered the seventh section with much attention; and I am of opinion that, although it empowers the Commissioner, upon the examination of the debtor's petition, to grant him a temporary and limited protection from arrest, yet it does not authorize the granting any further

order of protection, or the extension of that order for any further period of time. It is said, however, that this construction will prove very inconvenient in practice. But I do not see that such will necessarily be the case. By the second section, the Commissioner, if satisfied of the truth of the matters alleged in the petition, is to direct a meeting of the creditors to be convened at such time and place as he shall appoint; and if at that meeting certain facts concur, the president of that meeting, who is to be appointed by the Commissioner, shall, by the fourth section, fix another meeting of the creditors on a day not earlier than seven, nor later than twenty-eight days from such first meeting. The resolution of this second meeting is, by the sixth section, to be communicated within fifteen days to the Commissioner, who is thereupon empowered to grant a protection from arrest to the petitioner under that section. It seems to me, therefore, that the Commissioner can have no difficulty in calculating the time which will necessarily elapse, before he can be in a situation to grant the petitioner's certificate of protection under the sixth section, and in making his first order accordingly. The words of the seventh section are, 'that it shall be lawful for such Commissioner as aforesaid, upon the examination of such petition as aforesaid, to grant to such petitioning debtor a temporary and limited protection from arrest.' It gives no power at any other time or times. Where it is the intention of the legislature to do so, it is expressed in terms, as in the sixth section, where he is authorised '*from time to time* to indorse on such certificate his protection of such petitioning debtor from arrest.' The intention of the seventh section is, that the debtor may be free from the fear of arrest during the time he is taking the proceedings, under the preceding section, to obtain the assent of his creditors to his proposition; and with this view the protection thus given is to be binding as against all his creditors, whether having notice of the proceedings or not; whereas the certificate granted under the sixth section protects him as against such creditors only as have had due notice of the meetings. I do not think it is material to consider whether the creditor in this instance had notice; inasmuch as this order of protection, if valid at all, can only be so as an order made under the seventh section, which, as before stated, applies equally as against all creditors, whether having notice or otherwise. For the above reasons I am of opinion that the arrest was proper, and that this rule must, consequently, be discharged; but, under the circumstances, without costs."

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NOTE AS TO CHARITABLE TRUSTS.

WE have already stated it as our opinion, that the principle on which the bill for administering charitable trusts is founded is a sound one. (See 2 L. R. 190.) Since we noticed that bill, we cannot say that it has been improved by the alterations which have been made in it. Among these we cannot but consider the qualification clause for the commissioners as the most singular we have ever seen. It enables the Lord Chancellor to select from the Vice Chancellors the Master in Chancery, and all barristers of twelve years' standing, proper persons to be the commissioners; and there is one other qualification, that of having "served the office of Chief Justice of Bengal." What peculiar quality attaches to this office remains to be discovered. All other *ci-devant* Colonial Judges are disqualified. A Chief Justice of Bombay or Madras, or of any other colony or possession, is positively excluded, not only for the present, but for all future time. Why is this? It has not been unusual to select for the Chief Justice-ship of Bengal a Judge of the other presidencies. Why then this preference of Bengal? Why should we be always confined to this province of India? Does not the course of justice flow as purely in the other provinces? Might we not, at some future time, say, with the Syrian, "Are not Abana and Pharpar, rivers of Damascus, better than all the waters of

Israel?" But this is an unimportant point. What is the real object of the bill? It is stated in a few lines. It appears, by the Charity Digests, that there are about 30,000 distinct endowments and donations; of these nearly 20,000 are under 10*l.* *per annum*, and the bulk of these 20,000 under 5*l.*; nearly 4000 more under 20*l.*; nearly 2000 more under 30*l.*; 1,800 under 50*l.*; and about 1,500 under 100*l.*

To talk of administering these charities by means of the Court of Chancery is a farce. There are immense charitable funds in the aggregate, but so scattered, diffused, and squandered throughout the country, that they cannot be applied to the uses intended by the donors by means of any existing machinery. We may lament that the Court of Chancery is utterly inadequate in its present state to grapple with the evil, but we must take things as we find them: and while we are reconstructing the Court of Chancery, thousands of charitable objects entirely fail. We believe, therefore, that a Board properly constituted would do much good: and we know of none better than the one proposed by the bill of last session. We then stated that we considered the proposed "Inspectors" to be a defective part of the machinery. To be effective they should be appointed by the Commissioners; and we doubt very much whether two would be sufficient, at all events power should be taken to increase the number. It has also been suggested that the Commissioners should hold during pleasure, and we think this would be a useful check upon any improper or negligent use of the very important and delicate duties entrusted to the Commissioners. Moreover, if there be any real intention of passing this bill in the present session, we think it would be advisable entirely to relieve it of any clauses relating to charities above 100*l.* a year; for it is in those below that amount that the real grievance lies — and this grievance is an utter failure of justice, from the expensiveness of the Court of Chancery.

POSTSCRIPT.

If we had any particular gratification in finding our prophecies come true at the serious expense of others we might enjoy it now to our heart's content, when we look upon what is called the "Railway World." Far be it from us to attempt to unravel the almost inextricable confusion in which all connected with it are involved. Proper tribunals, such as we have contended for, would not have prevented all the mischief that has occurred; but if they had been established, that infinite expense, vexation and loss would have been avoided, we have not the slightest doubt. The Legislature is slowly as a body coming to this conclusion, to which many individual members have long arrived; and we are not surprised to find that a proposition to establish proper tribunals was received in the House of Lords a few nights ago, with general cheering. To show that this is not very incredible we will transcribe one of the many conversations which have taken place this session on this subject in the House of Commons. The one to which we allude was on the 17th of March, which is thus reported in the Times:—

"Mr. Lockhart complained that the committee on the Glasgow Water Works had lapsed in consequence of the non-attendance of the selected members. This put the parties to the greatest inconvenience. In some instances the costs incurred per diem were upwards of 400*l*."

"Mr. Estcourt suggested that honourable members who were absent through their own fault should be obliged to make good the expenses to which the parties promoting or opposing bills were put in their absence."

"Mr. Bouverie said that a fine should be enforced for non-attendance, as was the practice in election committees."

"Mr. Aglionby agreed that some penalty ought to be imposed to enforce attendance. The House was *not aware of the frightful expense* to which parties promoting bills and others were put by the delay of even a few days. *They sometimes amounted to thousands on thousands*, and this in committees which lasted only a few days. This was an evil for which he hoped some remedy would be applied in the next session."

And so hope we, Mr. Aglionby, and the first part of this remedy is to get proper judges. The present system is a mockery of justice.

We are exceedingly glad to find that the dispute between the Bar and the Press is at an end: and we are personally much pleased to find that our own humble exertions¹ in this respect have been much more highly appreciated than they have deserved. We are satisfied that we only expressed the opinion at which all reflecting men on a cool survey of the whole subject would have arrived. We understand that on the Oxford circuit, the resolution excluding the Bar from reporting for the press, has been rescinded, and that the Western circuit has practically pursued the same course. There is an end, therefore, of the matter.

¹ 3 L. R. 27.

By an act of last session, 8 & 9. Vict. c. 56., a summary power is given of going before the Master in drainage matters; and orders in pursuance of the act have been issued, signed by the Lord Chancellor and Lord Langdale. They authorise an easy mode of reference to the Master, of which we highly approve and wish to see extended to other matters. One part of the orders, however, has rather startled the profession. This is Order III. which allows the Master of the Rolls or Vice Chancellor, "on consideration of the petition, *and without any attendance of counsel, solicitor, or petitioner* therein, if he shall so think fit, to make an order on such petition, &c." Let it be remembered in this laudable desire to save expense, that professional aid is frequently necessary for the protection of the suitor: that a proper judgment can only be arrived at on a full statement and consideration of all matters: and, moreover, that our judges are now never suspected of improper dealing; and why? because they act under the eye of an intelligent Bar and a vigilant solicitor. Let us in all our reforms not forget to protect their proper interests, not for their own sakes, but *for their clients*.

The Middle Temple has proceeded in pursuance of the Report which we printed in our last number (p. 407.), to take the necessary steps for the appointment of a Reader in Jurisprudence and Civil Law, and the Benchers have out of more than twenty applicants, many of whom were persons, as we understand, of great acquirements, selected Mr. George Long. In this difficult and somewhat delicate task we are sure that the Benchers have conscientiously endeavoured to select the candidate whom they considered the best qualified, and we believe it will be found that they have made an excellent appointment. The good work then of founding a law school has been commenced, and we cannot doubt that it will proceed. Bodies like the Inns of Court move slowly: but the obstructing party is a very small one; and although we dare say there is much indifference and lukewarmness in the way, we cannot doubt that progress will be made in so useful and honourable a cause. Unless, however, a general course be established, and attendance on some one or more of the lectures be rendered compulsory, the plan cannot be attended with permanent or extensive advantage. In the mean time, Mr. Wyse has obtained a Select Committee to inquire into Legal Education in *Ireland*. We believe that it is not unlikely that this committee and its inquiry will be extended to England.

April 27, 1846.

THE
LAW REVIEW.

ART. I. — PROXIES IN PARLIAMENT.

ON Monday the 22d of June, 1846, the Customs Duties or Tariff Bill being appointed for commitment, the Duke of Richmond presented a petition from the Spitalfields weavers, praying to be heard at the bar by their counsel against the portions of it which related to duties on silk; a similar petition was presented from the Macclesfield trade; and his Grace moved that the counsel for the petitioners be heard. He stated that no desire of creating unnecessary delay, and no wish to offer a vexatious opposition, dictated either the petition or his motion upon it. But it happened that the silk trade was, in its details, so complicated as to be little capable of satisfactory explanation in their Lordships' House. The technical terms were of an import which his Grace professed his own inability to master, and he should in vain attempt to explain the petitioners' case. As an instance, he referred to the allegation in the petition, that though the measure of the Government professed to give the silk trade a protection of 15 per cent., they were fully prepared to show, that from the intricacies of the manufacture, a great mistake had been committed by the framers of the bill, and that only 9 per cent. protection was the real result of its provisions. All this they had instructed their learned counsel fully and distinctly to explain, and his Grace trusted that no objection would be offered to the reasonable request of allowing them to be heard.

Lord Dalhousie objected to this entirely, and contended that it was wholly against the usage of the House to hear counsel on the merits of any general measure. His Lordship held it to be clear that they only heard counsel on bills af-

fecting particular classes or particular districts, and never on such bills as affected the community at large. He cited the precedent of 1808, when there had been a similar petition against the Orders in Council; and on a motion being made to hear counsel for the petitioners, after a great debate in which Lords Holland and Erskine supported, and Lord Eldon, then Chancellor, opposed the proposition, Lord Dalhousie said it was rejected, and that the House refused to hear the counsel.

Lord Brougham, though a decided friend of the bill, was clearly of opinion that the prayer of the petition should be granted, and he supported the Duke's motion. He declared that he should vote with great reluctance for the measure, as far as regarded the silk weavers, if the House, by refusing to hear them, shut out the light offered to guide the deliberations of their Lordships. He could understand an enemy of the measure wishing to take such a course; but, as its friend, he would not join in obstructing discussion. As for Lord Dalhousie's precedent, he expressed the utmost astonishment at his Lordship having been so grossly misled as to state the rejection of the motion in 1808, and the refusal to hear counsel. Lord Dalhousie here held up a volume of the Parliamentary Register as his authority. But Lord Brougham said he had infinitely better evidence than that; for he himself was the counsel in 1808. He was heard for some hours; he opened the case of the petitioners; he called a score or two of witnesses; he summed up their evidence; he was for days and weeks at their Lordships' bar representing his clients the petitioners; and their Lordships had the printed minutes of that evidence among their papers. He had been, in like manner, heard by himself and his witnesses for three weeks in the House of Commons. Again in 1812, there were petitions to the Commons to repeal the Orders in Council; and an immense body of evidence was taken during four or five weeks: counsel were not indeed heard; but that arose from the accident of his (Lord Brougham's) being then a member of the House of Commons, and he conducted their case in that capacity with the constant and invaluable aid of his noble friend, Lord Ashburton. The result was, that the Government yielded, and rescinded the obnoxious Orders. Lord Brougham ridiculed the distinction taken, of hearing counsel against a measure affecting one class or one trade,

and refusing to hear when there were many classes and trades equally suffering from its provisions. The bill affected silk : if it affected silk only, said the noble Earl, you can be heard against it ; but not if it affects cotton, tallow, iron, lace, as well. Surely it did not affect silk the less for affecting those other trades also. However, the case of the Orders in Council was decisive, for that was quite a general measure, or rather system of measures ; and so the noble Earl's precedent, instead of supporting, at once put an end to his whole argument.

After some further discussion, in which Lord Ellenborough said that Lord Brougham's support of so inconvenient a course as hearing counsel, could only arise from the recollections of his own early triumphs in that capacity, the House divided, and the Peers present voted in favour of the Duke's motion, by a majority of 43 to 42. Whereupon proxies were called ; and there being a majority against the motion, of the Peers absent, some in Ireland, some in Germany, some in the East Indies, it passed in the negative by a majority of four. Lord Brougham then observed, that if proxies survived this, they were immortal. Lord Lansdowne hoped they were. Other Lords, however, had other feelings. Lord Wicklow trusted they would be abolished. Lord Grey promised to support any proposition to that effect. Lord Brougham having stated that this was a decision on a quasi judicial matter, Lord Grey said it might as well be called a geographical as a judicial question. Lord Brougham reminded that Lord of his expression, not that it was judicial, but *quasi* judicial ; and in truth so it was. For, when a measure is petitioned against, as affecting the patrimonial interests of a particular body of individuals, and when they claim to be heard in their own defence, they may justly be said to appear as parties seeking justice from the House. A divorce bill is as much a bill as a tax or a mutiny bill ; yet, because it affects individual interests, it is regarded as a *quasi* judicial proceeding, and dealt with throughout as such, and proxies are prevented from voting—though Lord Grey would say it is an abuse of terms to call it and treat it so—and that it is no more judicial than geographical.

The end of proxies is by many believed to be approaching, in consequence of what passed on this occasion. But only

Lord Wicklow, a very able man, of those who have by their standing in the House a right to deliver confident opinions on such a question, gave any vent to his sentiments. Lord Grey, also a clever man, and of great spirit (important qualities in a politician), has only been three or four months in the House, and therefore his authority must be taken with this qualification. Lord Brougham gave no opinion; he only deprecated the use of proxies on such a question, and foresaw how much it endangered the privilege. No other law lord took any part in the conversation; and Lord Lansdowne, a person of great authority in the House, expressed a decided opinion in favour of the right, hoping it might endure for ever. There seems, therefore, great reason for entering at present into the examination of the subject, and we shall accordingly, after first stating the origin, and relating the history of proxies, describe the extent of the privilege at the present day, and then consider the reasons for and against its being suffered to continue.

I. It appears that, from the earliest times of parliament, the Peers, when summoned by the Crown, had the right, with the licence of the Sovereign, to excuse their appearance, and to send representatives, procurators, or proxies, furnished with powers to vote for them. This licence was sometimes withheld; but more generally it was granted. Those who neither came, nor sent proxies, were amerced, originally an earl in 100*l.*, and a baron in 100 marks; which sums were afterwards altered to 100*l.* for the fine of a duke, 100 marks for that of an earl, and 40 for that of a baron.

Sometimes the summons to parliament expressly denied the privilege of appearing by proxy *pro hac vice*. Of this, precedents exist as early as the 6 Edward III. In such cases, the Peers who did not attend personally obtained special licences to be absent. Where the clause refusing to allow proxies (*Procuratores, legitimo cessante impedimento, pro vobis admittere nolumus*,) was not inserted in the summons, the Peer might make his proxy without any licence, and this appears often to have been done: where the clause was inserted, the licence set that circumstance forth, and made an exception in favour of the Peer so licensed. Elsynge (*Manner of holding Parliaments*, 124.¹) gives a precedent of this, in

¹ This work of Mr. Elsynge is one of great use and accuracy, and not of much pretension; and is carefully to be distinguished from the ancient book

the 22 Edw. III., being a licence to the Abbot of Selbye. It states the name of the person who had obtained it from the Crown; sets forth the summons to appear, "en propre personne sans faire procureur en cette partie;" and adds, "Nientmoins a la requeste nostre cher et foiall Johan Darcy nous vous tenons pour excuse de votre venue en propre persone a cette foiz, issint qe vous face un suffisant procureur de y venir en votre nom." This was by warrant under the Privy Seal, to pass it under the Great Seal.

Elsynge considers the King's verbal licence sufficient, but says that generally a formal one by sign manual was obtained; and when it was not produced, an attestation of its existence was given generally by a Peer, though occasionally by a stranger, and this in the proxy itself — as "Abbas de Evesham sub Regis gratiâ absens, attestante Thomâ Cromwell armigero, constituit procuratores."—

Since the 38 Henry VIII. no such attestation is to be found; but the proxy has always mentioned the licence, on the ground that no one would presume to affirm he was licensed if he were not.

It thus clearly appears that the right of appearing by proxy arose from the attendance in Parliament being regarded as a burden to the Peer. The King required his presence, in fact, for the purpose of strengthening his hands, and, above all, of preventing cabals among the Barons. It placed them under some restraint and inspection, and it also aided him in obtaining supplies. When the Baron's attendance could be dispensed with, his sending a proxy was a kind of pledge for him, and committed him to the King's measures.

But to continue the history. — In 1626, the House resolved that a Peer having leave of absence from the Crown, and giving his proxy, determines both his proxy and his licence by coming and sitting in the House; and that if he with the same title, the "*Modus tenendi Parliamentum*." The latter is much quoted by Lord Coke (4 Inst.), and he was exceedingly mistaken in supposing it a book of authority; for Mr. Prynne proved it to be a forgery, and of no authority; to which opinion Selden (*Titles of Honour*, p. 610.) entirely subscribes. Elsynge was Clerk of the Parliaments in the reign of James I., and wrote his book in the last year or two of that reign. It was first published in 1768, from the MS. in the British Museum. *Harleian Coll.*

has the licence, makes his proxy, and then attends, he must have a new leave before he can make another proxy.

Originally it should seem any one, though not a Peer, might be a procurator or proxy of a Peer. This is, we think, satisfactorily shown by Elsynge in two ways. There exist proxies made by Abbots having seats (mitred abbots). Thus the Abbot of Selbye made John Gouldale, a monk of his house, and William R. clerk, his procurators, in the reign of Edward III., and there are many other such examples. Now why should the temporal Peers have less privilege? or rather, according to what we have stated on the real origin of the privilege, why should not the Crown have in their case, the attendance of some persons, when the absent Peers could not find representatives among those present? Accordingly we find many cases of persons acting as triers of petitions, and sitting in committees, whose names do not appear in the roll of summons. Therefore it is highly probable that those persons came and acted as procurators of absent Peers.

The period of time when this latitude of privilege ceased, and when only Peers present could hold the proxies of absent Peers, is not at all ascertained. But certainly such has been the constant case, at least since the beginning of Henry VIII.'s reign.¹

It was also usual of old to appoint several procurators, and sometimes to name and empower them *conjunctim* and *divisim* (4 Inst. 12.), which raised a question in Queen Elizabeth's first parliament, *Quid juris* when two voted Not content, and one Content? The Lords consulted the Judges and Masters attendant upon the House, and desired them to debate the matter among themselves. Their opinion being that it was no vote, the Lords decided that it was void, and that all must concur. (4 Inst. 12.) An order of the House, soon after the Restoration, restricted the number of procurators to two.

It should seem that, about the same time, the grant of proxy was restricted to such persons as were of the same rank with the absent Peer; for the licence in earlier times is silent on that matter; whereas in Charles II.'s time it states that the proxy shall be to "some one of your own quality."

¹ Com. Dig. Parliament, D. 19., who quotes Selden.

Of old, too, there was no distinction whatever as to the matters on which the procurator should vote for his constituent,—he was his “*alter ego*.” Hence he could vote on judicial as well as other matters, and in committee as well as in the House. But in 1697, 15th March, the standing order No. 83. was made, on the occasion of the Countess of Macclesfield’s divorce (the mother of Savage the poet, who was bastardized before his birth by the act); and the order forbids generally any proxy to be used in any judicial cause. An order had been made in 1689, June 11., affirming the use of proxies in deciding the preliminaries of a cause, but not in giving judgment on it.

II. The proxy now sets forth that the Peer giving it “*per licentiam Domini Regis sufficienter excusatus abesse*,” nominates A. B. his “*verum, certum, et indubitatum factorem, actorem, attornatum, et procuratorem*,” and gives and grants to him “*plenam auctoritatem et potestatem pro me et nomine meo de et super quibuscumque causis et negotiis in presente parlamento exponendi, et declarandi, et consulendi, et impendendi, statutisque et ordinationibus quæ ex maturo et deliberato judicio dominorum congregatorum inactitari seu ordinari contigerint nomine meo consentiendi, eisdemque si opus fuerit subscribendi, cæteraque omnia et singula quæ in premissis necessaria fuerint faciendi et exercendi, in tam amplo modo et formâ prout ipse facere possem aut deberem si presens personaliter interesssem*.”

The rule now is, that a proxy of a Spiritual Peer can only be held by a Spiritual Peer; and of a Temporal Peer, by a Temporal Peer.¹ It is also provided by the standing orders, that no Peer can hold more than two proxies²; and all proxies must be entered in the proxy-book before four of the clock on the day when they are to be used. A Peer vacates his proxy for that day by coming into the House during its sitting. And no proxy can be given on any divorce bill, or on any cause, whether appeal or writ of error. If a bill of pains and penalties be regarded as a judicial cause, the Eighty-third Order extends to it. The manner of using proxies is this. As soon as the votes of those present have been counted, if no one calls out “Proxies,” the division is declared by the

¹ Order 80. 25th April, 1626.

² Order 79. 25th Feb. 1625.

Speaker—usually the Chancellor—though, in his absence, the Crown may name either a Peer or a Commoner to be Speaker. If any Peer cries out “Proxies,” the Clerk reads from the proxy-book, “John Lord A. hath the proxy of Thomas Lord B. ;” and Lord A. then says Content, or Not content, as he may please. When once entered, a proxy is good until revoked.¹ The necessity of restraining the right of holding proxies appears from this, that in 1625 the Duke of Buckingham once held fourteen proxies, which gave rise to the order already cited. In 1588 the Earl of Bedford held fifteen, and the Archbishop of York six.²

III. Such being the practice, and such the nature of the privilege, we may now consider the doctrine of proxies, and the foundation on which the use of them rests, before examining the reasons for and against the continuance of the right. It is commonly said, that the Peer holding a proxy is the attorney or representative of the absent Peer; that he, therefore, being present and deliberating on the question before the House, exercises his judgment; and that, accordingly, the absent Peer’s vote is given by his representative upon due consideration of the case. Nothing, however, can be more groundless than this doctrine. A Peer may, and frequently does, give his vote one way, and his proxies the other. To this it was answered, by the supporters of the doctrine which we have just stated, upon the late decision which we have described, that this, in contemplation of law, arose from the supposition that the Peer had changed his opinion since he gave his own vote—not a very decorous supposition, be it in passing observed, since it assumes that the noble Peer, having made up his own mind during the debate, and voted according to the conclusion at which he had deliberately arrived upon hearing the arguments on both sides, had all of a sudden changed that deliberately and well-considered opinion without hearing one single word against it. However, the Duke of Richmond at once stated, that he had again and again voted one way himself, and given the two proxies which he held, different ways; so that this gross absurdity must now be maintained in order to support the theory; that he had changed his opinion during the ten minutes which elapsed between his own vote and the giving of

¹ Order 20. March, 1696.

² Rushworth, p. 269.

his first proxy; and then, in half a second had, on further consideration and more mature reflection, changed it back again before he gave his second proxy. It may well be imagined, that no one was found so hardy as to ventilate this additional piece of doctrine.

We may therefore conclude that proxies, whatever may have been their origin, are *now* allowed, in order to put more votes in the power of members attending, and to let the absent, who have heard nothing, give their votes without having heard a word of the discussion, nay, without being aware of the matters on which their votes are to be given. They give their proxies, if they are so minded, without any restriction; but also, if they please, they may give them under condition of their being used on one question, and not on another, nay, on condition of their being given in one particular way on all questions; and indeed this is the ordinary, almost the universal, case. An absent Peer votes as if he had heard and considered, though he has neither heard nor considered at all. For anything he can tell, the most important considerations may have been urged in the course of the debate. For aught he knows, or can possibly know, the most unexpected information may have been communicated to the House by a Minister, a communication which, had he been aware of it, would certainly have changed his opinions. Nay, a public officer may be assailed by a motion to censure his conduct, and the *prima facie* case against him may have been rebutted, the charge shivered to dust by the facts, and by the documents brought forward in his defence, yet the judgment of condemnation, as far as the absent Peers are concerned, goes forth, and it may depend wholly on their votes. The majority of those present may have acquitted, but the scale shall be turned against the accused party by the mute votes of the absent judges. On the late division, reasons were urged, facts were stated, details were referred to, many precedents were produced, and the most unanswerable reply was given to the precedents mistated by the adversaries of the unfortunate petitioners, whose means of gaining a livelihood were invaded, and whose honest, industrious, peaceful lives, under all privations, and unshaken loyalty, amidst all seductions, were fully proved. All this produced a vote in their favour,

a judgment of those present, that their humble and reasonable prayer be granted, when the proxies were flung in, the scales turned, and the balance cast against them by the votes of those who had heard nothing, and who knew nothing. What more conceivable than that Lord Dalhousie, who had been so grievously misled, should have said to one whose proxy he held,—“ Oh, never mind the petitioners, they can't be heard; such a thing never was done before—the House came to this resolution in 1808, on the Orders in Council!” “ Then give my proxy against them,” might be the answer. Well—the statement is most decisively and triumphantly refuted by the very person who had been heard as counsel for the petitioners in 1808, and who instantly that Lord Dalhousie took his seat, rose and referred their Lordships to the Journals and the Minutes of Evidence taken in 1808 on behalf of the petitioners, referring likewise to the recollection of many Peers who had heard him conduct the case for a fortnight at their Lordships' bar. But still the absent Peer's proxy is given, and decides against the petitioners of 1846, reversing the decision just given in their favour by the Peers who were present, and who had heard the exposure of Lord Dalhousie's error.

Nor is this all. A proxy was given of one noble person, now Governor of Madras. How many changes in the circumstances of the country may have taken place since that proxy was given! The Minister who held it may have passed into opposition,—he may have wholly altered his views of public policy,—he may have entirely changed his party connections. Indeed this very case is the one actually before us. When the Indian Governor gave his proxy, the Ministry in whom he confided were as much opposed to the policy which they now pursue upon commercial questions, as men could well be upon any subject. They had subsequently become converts to the repeal, the total repeal of the corn laws. They had in consequence become the object of bitter attack with the great body of their former supporters in both Houses, but especially in the House of Lords. Yet they used, or, which comes precisely to the same thing, they were enabled to use the Governor's proxy, who gave it in totally different circumstances to men whom he believed to be against the repeal, whom he knew to be cordially and unanimously supported

by the Conservative party in the parliament and in the country. They, the proxy-holders, had heard the debate; they had considered the question; they had changed their views; they had become converts to the free-trade doctrines; and they had ceased to act with the Conservative body. But their absent friend, the proxy-giver, had neither heard the discussion nor reconsidered his former opinions; yet his proxy is used as if he had heard the debate, and joined in the movement, and partaken of the conversion.

Surely it is against all reason that such a system should be suffered to continue; and we are thus called upon to inquire what benefits it produces to balance its evils, and counteract the fatal effects it must have in lowering the estimation in which the proceedings of the Lords are holden, and we hope ever will be holden, by the country.

The principal argument for the practice of absentee votes is drawn from the notion, that it is an important privilege of the peerage, and ought not to be taken away. But, surely, if it be regarded calmly, and be found a privilege contrary to all justice, all reason, nay, all common sense, there is no ground whatever for retaining it. Its origin is clear, though we have no means of tracing the date of its introduction. It began in those remote times when attendance in parliament was deemed a burden and not an advantage, a grievance and not an honour; when enjoyment of the state and eminence of a baron was coupled with the condition of attending the Sovereign's parliament for a few days, to pass bills, and to levy taxes, and to raise troops; possibly, also, to give him advice: nay, before taxes and paid troops were introduced, to support the dignity and power of the Sovereign; and, when he was maintained by his lands, the attendance was required in parliament for the purpose of strengthening the arm of the Prince, chiefly by preventing cabals and conspiracies of his feudal nobility. In the like manner, the towns and counties were required to attend by representatives, in order to maintain the regal authority over them, and to obtain supplies of men and money when the feudal revenue and feudal army proved insufficient to meet the exigencies of the public service; but attendance in parliament of the Commons was at all times required by the Crown, as a measure of precaution, and to strengthen the hands of the Sovereign. Thus attend-

ance in both Houses, after the two were separated, and of all classes, both the greater barons and the lesser, was a duty exacted, a burthen imposed; insomuch that wages were paid to the deputies of the Commons, whose attendance never was dispensed with, who were amerced if they did not appear, and appearing, were not suffered to depart without the King's licence. The greater barons, afterwards the peers, were not paid at any time their wages, because their absence might be excused. A borough was obliged to send representatives, being incapable of attending personally. A baron or peer was excused, in like manner, from personal attendance if he sent his representative, the procurator or proxy being in fact the representative, and even being called by the same name. So it was in the feudal parliaments of the Continent. In that of Sicily, for example, originally all the orders might send proxies; but by a law of Philip I., in the thirteenth century, the privilege was confined to the clergy and nobles; and in 1522 this was further restricted by each absent voter being bound to give his proxy to one of his own quality.¹ The barons, or peers, were thus at all times excused from attending in person, and allowed to appear by attorney or proxy, but only when permitted by the Sovereign; and the form of the licence is still retained in the proxy to this day, though no licence is ever asked or given.

It thus appears that the origin of the privilege was connected, and immediately connected, with the attendance, being compulsory, and not voluntary,—a burthen, not an honour; just as the wages of the representative were connected with his attendance, which was a burthen on his constituents and himself. But when it has long ceased to be such, and when, instead of a burthen, a seat in parliament has become a much-valued advantage and distinction, the wages have ceased as a matter of course. Thus surely, by parity of reason, the privilege of voting by proxy ought to have ceased as soon as the Peers' attendance became no burthen, but a privilege, a benefit, and an honour.

It is often said that in other places as well as Parliament, persons absent are allowed to give their votes by proxy. But we believe that this practice is usually confined, except in a

¹ Brougham's Pol. Phil. i. 610.

very few insignificant cases, to the vote for the election of office-bearers — an exercise of power rather than of deliberation, of choice rather than of judgment — and which is wholly different from the proceedings in which Peers' proxies are made and used.

The real ground for so anxiously wishing to retain this privilege is, that its exercise exceedingly aids the manoeuvres of party, and, above all, the operations of the Government. The difficulty which the managers of the Commons find in collecting their forces, and keeping them together, are thus very greatly diminished in the Lords; and as their Lordships are a race of men less easily driven, and the "*whip*," as it is technically called, can less conveniently be used in collecting them, the power of voting without employing that instrument becomes exceedingly valuable to party chiefs. The time was when a Minister came down with a dozen and upwards of proxies in his pocket; and decorum seemed to require that this should lead to some restriction upon the privilege. It was then ordered that no more than two should be held by any Lord, as we have seen.

Nothing can better illustrate the absurd and unjust nature of this privilege than the restraints from time to time imposed upon the exercise of it. Originally there was no question whatever upon which a Peer might not vote, though absent from the debate; and there was no stage of any measure on which his proxy might not be given. He might decide a cause of which he had not heard one word. But this was deemed too strong for the common feelings of justice implanted in all men's minds; and so, though only at the end of the seventeenth century, and after the Revolution, the exclusion of proxies from all judicial proceedings was effected. Lord Hale was wholly unable to say whether or not in his time proxies could be given in judicial matters.¹ So in Committee, as well as in the House, at first, and for many ages, proxies might be given. But it was thought absurd, that men not present at the discussion of the details of any measure should vote upon them, and the absentee vote was confined to questions before the House. Yet, let us ask what reason there is for excluding this right in

¹ Jurisdiction of the House of Lords, p. 204.

judicial questions, and allowing it in all others? Is it more necessary for a judge to hear, before he decides, than for a law-giver to deliberate, and be informed, before he enacts; or for an inquisitor into official malversation, before he pronounces his sentence upon delinquents, or for a counsellor of the Crown, before he declares his counsel? Then, are decisions on causes more important than acts to bind the whole people of the realm, or resolutions to affect the whole policy of the State? Is the fate of a divorce bill more important to the common weal than the sanction of peace, or the approval of war? No argument can be urged to distinguish the cases, either from their nature, or from their relative importance. Again, are the details of a bill more difficult to decide upon than its whole foundation and principle? Then, why must an absentee be suffered to pass or to reject it altogether, and not be allowed to modify one of its most trivial provisions — not to mention that, with a most admired inconsistency, the absentee may by his vote on the report decide the fate of the very same details, when moved by way of amendment, on no one of which his proxy could be used in the committee?

Nor, let it be forgotten, that there seem peculiar grounds for the Lords abandoning this absurd and odious privilege, when their high judicial functions are considered.¹ They form the supreme judicature of the realm; and their whole proceedings, as well legislative and administrative² as judicial, are conducted with regard to their being a court of judicature. Thus they examine all witnesses on oath, whether on judicial or on other matters. Indeed, except upon impeachments and the trial of Peers for felony or treason, they exercise no functions which admit of receiving evidence by parole, unless that divorce bills may be called quasi judicial, and proceedings on peerage may fall within the same description; but impeachments, being of rare occurrence, and Peers' trials as rare, and not above some half-dozen divorce bills passing in a session, and not so many peerage cases, the great bulk, almost the whole

¹ By the order of 1689 already referred to, proxies are expressly allowed in all preliminary questions of a cause; but the decision on these may really dispose of the final judgment itself.

² This term is used for convenience only, and not with any nice accuracy, to designate the proceedings of a kind connected with ministerial measures, the votes on which are called political, and not legislative matters.

of the Peers' proceedings, in which evidence can be taken, are of a merely political or legislative nature, and yet all evidence is taken upon oath. Surely a great judicial body should be, of all others, the one to eschew so unseemly a practice as receiving men's votes to decide questions, of which they are in absolute ignorance, and upon which they have not heard a single tittle, either of the reasonings or the proofs.

There has sometimes been an argument used to defend this practice, which we deem more plausible than solid. A Peer, it is urged, and the like may be said of a commoner, may enter the House just when the question is about to be put, and may give his vote in as entire ignorance of its merits as if he were at Madras during the debate. But nothing can be more fallacious, indeed flimsy, than this mode of arguing. It is a common one enough, and is never successful, except to entrap the thoughtless partisan, or delude the giddy multitude. It might be employed to justify any abuse, however gross. Thus, Peers may enter the House after the counsel in a cause have closed their case on both sides, and by their votes may decide it. Nay, they may come in and hear one side, and decide against the party they have never heard! This they *may* do at the present day — this they *might* do in 1697. But who ever dreamt of using it as an argument against the Order 83. to exclude proxies in judicial matters? And yet there cannot be a doubt that it would have afforded just as good ground — because the very same ground — for resisting the passing of that order, as it does for resisting the proposal now under our consideration. The answer in both cases is the same, and it is decisive, — You shall on no account argue in favour of a right, which, from its very nature and constitution, is and must always be, not merely liable to abuse, but in itself an abuse, by citing cases of rights not proposed to be abolished, which may, by bare possibility, be abused too. This is the very worst form of employing the fallacy, that from the abuse you ought not to argue against the use of any privilege, right, or power. Here the case cited is the abuse of a right, not now impeached, and it is only a possible event. But the usage in question, of absentee-voting, is of necessity an abuse; because it never can be right, that he who cannot hear should decide. However, we must go further and admit, that if men often came to vote who had not heard the debate,

and if the voters thus absent often came in and overpowered the voices of those present, some order would assuredly be taken for correcting the abuse. No one deems it other than an abuse. It is an abuse to which the power of being absent during a debate, and present at the vote, is liable. But proxies are in themselves an abuse, and the abuse and use are exactly co-extensive.

There are several proposals afloat on the important subject we have been considering. Beside the obvious one of at once abandoning the privilege, it has been suggested that the calling for proxies, which is now considered as of course, and must prevail, on any one peer saying "Proxies," should be subject to a determination of the House. But though this might exclude the use of proxies on questions which, like the recent one of the silk-weavers, almost all those present deemed ill adapted to the exercise of the privilege, it is manifest that it would generally lead to the exclusion of absentee votes, inasmuch as the present majority would generally prevent the introduction of an absent majority. We must, however, bear in mind that the House had, at one time, very nearly come to a decision, possibly only declaratory, excluding the call for proxies in any case as a right, and debating their admission, provided the subject were discussed before the question was put. This important passage appears to have been unknown on the recent occasion, which has given rise to the present discussion. In 1811, Lord Eldon, then Chancellor, moved four resolutions to this effect, which were only prevented from being passed by the adjournment being moved, and carried by 102 to 99. The origin of his motion was the objection taken to allow proxies, which were called by Lord Liverpool, for the purpose of rescinding in the House a vote on the Regency Bill, given in Committee. The opposition contended that proxies could not be called in the then state of the parliament, which they considered as no parliament, but a kind of convention of estates, "in consequence of the King's incapacity." Lord Eldon thereupon, after sufficient time given for consideration, moved his resolutions, affirming the right to call proxies in all cases, "unless there shall be a standing order to the contrary, or unless it shall have been otherwise determined by the House on a division taken previous to the decision on the

main question," and that on every decision on such question respecting proxies, proxies shall be allowed to be taken; and that these propositions shall apply to all proceedings of the House, when duly assembled, although the occasion of calling Parliament may not have been declared by the Crown. It is manifest that this latter proposition was the ground of moving the others; and the Opposition so regarding it, voting for the adjournment, by means of which the resolutions were lost. The Opposition Peers in this debate supported the usage of proxies generally; and one of the main reasons urged was, that they afforded a security against oppression, and royal influence or intimidation. "They said it was in human nature often for men to do by their proxy what they were afraid openly to do in person"—a sufficiently humiliating view of "human nature," as shared by the Lords, it must be confessed, — and a view as entirely inapplicable to that illustrious body as any that could be fancied. For it is allowed by all observers of the important services rendered by the House of Lords to the Constitution and the State, in late years especially, that whatever faults those exalted personages may have, timidity is not of the number; and that no such vain hope ever entered any man's mind, as that of working upon their Lordships by intimidation. It deserves, however, to be considered, that in rejecting Lord Eldon's four resolutions, the Lords by no means pronounced any opinion against the proposal of allowing a previous vote, whether or not proxies shall be called. The determination to adjourn the question was taken solely upon the refusal to allow that in a parliament assembled without the Crown's presence, proxies were admissible. Nay, it is very possible that their Lordships took for granted the right of the House to entertain the previous question on calling proxies; and it would not be easy to show the non-existence of this right.

It will form a fit close to this paper, confined, as it has been, to the English Parliament, if we refer to the subject as relates to Ireland and Scotland before the union.

The history of proxies in the Irish Parliament, and in

some respects the privilege itself, differs materially from that in the English Parliament. Their introduction appears to have been of a recent date; for the first notice of them in the Journals is said to have been as late as the year 1634. Lord Mountmorris states this in his "*History of the Irish Parliament*," and he appears diligently to have studied the MS. Journals.¹ At first, as in England, there was no limit to the number which a peer might hold, and twenty-nine being entered at one time, four and five each were held by several peers. It should seem that the introduction of this usage was the scheme of Strafford, then Lord Lieutenant; and soon after the restriction, which had ten years before been adopted in England, was introduced into Ireland, and only two were allowed to be held by one peer. These two absent peers were allowed to protest, as well as to vote by proxy; and hence arose a peculiarity in the form and ceremony of using the proxies. The peers holding them were introduced formally, as representing those whose proxies they held, and were placed and gave their proxy votes according to the precedence of the absent peers.

This right of protest was called in question on Lord Grandison's case, in 1765; and the Lord Lieutenant, Lord Hertford, to whom the question was referred, decided in the negative. A committee of the House, however, examined the matter; and finding many precedents — among others one of Lord Conway, the Lord Lieutenant's own father — the decision was pronounced by the Lords in favour of the right of protesting.

In 1641, an order was made that peers having estates in Ireland, and seeking to vote by proxy, shall first have leave of absence from the king or chief governor, to be allowed by the House. This qualification of having Irish estates, referred to a constant dispute raised on that head, a complaint being repeatedly urged, as appears on the Journals, that the voting by absentees was a grievance — manifestly through jealousy of Englishmen being made Irish peers. It should seem that nothing conclusive was ever done either way in this matter; but absentee proxies were constantly given without regard to the landed qualification. No instance of the old form of voting by the introduction and

¹ Vol. ii. p. 191.

placing of peers holding proxies is understood to have been known since 1770.

The language of the proxy in Ireland has always been English — in England always, to this day, Latin.

It must be admitted, in closing our account of the Irish proxy system, that it carried the absurdity of absentee-voting a great step further than the English. Nothing can be well conceived more absurd than absent persons deciding on questions which they never heard discussed, nor ever knew were to be mooted at all,—unless it be the additional aggravation of absent persons arguing in writing against the reasons which they never heard, or offering arguments which may have been answered and abandoned in the debate. In Ireland the peer present might vote and argue in defence of his opinion; and the same peer might in the name of his absent constituent enter on the Journals a copious refutation of his own arguments and a demonstration that the vote he had given was unjust, impolitic, and absurd. It is, however, to be observed that this was the undoubted practice of the Irish parliament, and the indefeasible right of the Irish peerage. How it came to be silently abrogated on the union, we cannot discover.

The Scottish parliament was distinguished from those of both England and Ireland by many peculiarities. Of these the most remarkable was, that all the estates sat to the end in the same chamber, though they voted separately. The peerage was likewise distinguished by its peculiarities. Thus the husband of a woman noble in her own right, sat and voted in her stead. Nay, if we be not mistaken, there was courtesy of a title, and the widower of a peeress who had borne an heir during the marriage, had a right to sit and vote after her decease. Absent peers were at all times entitled to send procurators or proxies, and deputies of the Commons seem to have had the right also. Nor was the privilege restrained until the statute of 1425 passed, which enacted that “All prelates, erls, baronns, and freeholders of the King (tenants *in capite*), within the realme, sen (since) they are holden to give presence in the King’s parliament and general council fra thincforth (from thenceforth), be

holden to compeir in proper person, and not be a procuratour, but if (unless) the procuratour alleage there and prove a lawchfull cause of their absence." Accordingly it appears by the table of acts passed in the same reign, James I., that those who could not give a reasonable excuse for their absence, were fined 10*l*. The words are,—"Compurentibus omnibus illis qui debuerunt, et voluerunt, et potuerunt commodè interesse, absentibus quibusdam aliis quorum quidem legitime excusati fuerunt, alii vero quasi per contumaciam se absentaverunt quorum nomina patent in rotulis sectorum, quorum quisque adjudicabitur in amerciamento decem librarum." This fine was considerably increased by the acts 1587, cap. 34, and 1617, cap. 7., and still more by two unprinted acts in the first parliament of Charles II., and the first part of William and Mary. But the act 1617 allowed prelates and peers who had a lawful excuse of absence, to give their proxies to others of their own estate, requiring however, a licence from the king to justify absence, if the king was within the realm, and from commissioners having authority in his absence. No power of voting by proxy was given to commissioners of shires and deputies of boroughs. Sir George Mackenzie¹ justly remarks that it was for the interest of the king thus to allow proxies, because having the power to refuse the licence he could make the privilege of no avail unless he pleased. It should thus seem that the king's licence never became a mere empty form in Scotland, as it did in England and Ireland, but was a substantial requisite or condition of the right of voting by proxy.

The chartulary of Kelso is preserved in the library of the Faculty of Advocates at Edinburgh, and it contains a proxy of the form used in the thirteenth century, for the date is believed to be as old as 1258. It is entitled—"Litera actor-natus ad parlamentum," and it sets forth that the abbot of Kelso, with consent of his Chapter, appointed two persons or either of them,—"*Nostros veros ac legitimos actornatos seu procuratores speciales ad comparendum pro nobis et nostro monasterio in parlamento domini nostri Regis, apud Sconum.*" (See Wright, vol. i. App. No. iv.) It thus appears that the form of the proxy in England and in Scotland was nearly the same.

¹ Observations, p. 345.

ART. II. — RAILWAY TRIBUNALS.

1. *Report from the Select Committee of the House of Lords on Railways, together with the Minutes of Evidence taken before the Committee.* 1846.
2. *Private Bills and Business of the House. Proposed Resolutions.* 1846.

WE are glad to find that the proposals which we thought it right to lay before our readers at the commencement of the session¹, with respect to some new tribunal for the despatch of railway and other private business, have not only been entertained, but will probably ere long be adopted.

The Report of the Railway and Canal Amalgamation Committee of the House of Commons of this session, contains the following recommendations: —

“The system of railways and canals is now become so extensive, and their relations amongst themselves are so complicated, that no enactments passed by parliament for their government and regulation can provide for all contingences, or be properly carried into effect, unless by the aid of some more efficient machinery than any which exist at the present moment. After mature consideration your committee have come to the conclusion that it is absolutely necessary that some department of the executive government, so constituted as to command general respect and confidence, should be charged with the supervision of railways and canals. Your committee entertain no doubt, that a department so constituted might, in addition to these duties, afford material assistance to parliament in railway legislation.”

The Report of the Select Committee of the House of Lords on Railways, after citing these recommendations, thus proceeds: —

“The committee having had these various subjects under their consideration, seeing the evils of the existing system, recommend the establishment of some department of the executive government on which should be imposed the duty of considering the whole existing system of railway communication through the country, the best means of perfecting it, and hereafter controlling the management by the various companies, in such a manner as to make the connection between their different lines most conducive to the

¹ 3 L. R., 415.

general advantage of the country, and most serviceable to its various local interests. They recommend that all propositions, or any scheme of railway, should, in the first instance, be submitted to this board, who should require the promoters to lay before them some general statement of its objects and advantages, and such evidences of their capability and bonâ fide intentions as might be deemed a sufficient guarantee on which to sanction further proceedings."

These reports sufficiently show the state of feeling in both Houses of Parliament on the subject, and we think therefore we cannot do better than close this short notice by the resolutions which have been proposed on this subject by Lord Brougham, and which will probably be moved in the course of the present session. They contain at once a most powerful exposition of the evils of this present system, and a remedy for most of those evils.

1. That the amount of private bills yearly brought into parliament has been continually increasing till the consideration of them has come to form a large proportion of the business transacted each session, more than 200 in one session having sometimes been passed, and many others thrown out at various stages.

2. That the construction of railways has still further and more rapidly increased this amount, so that the average of private and local and personal acts passed during the three sessions 1840, 1841, and 1842, having been 178, there were 171 railway bills brought in during the session 1845, besides common private bills; and during the present session there have been 212 other bills, and 482 railway bills, and in the session of 1845, 241 private acts were passed, containing 13,624 sections or schedules, beside bills brought in and thrown out at different stages.

3. That such private bills have dealt with an immense amount of property, and with the most important rights and interests of the community.

4. That most of such bills give the power of compelling landowners and other proprietors to part with their property, or otherwise suffer it to be interfered with; many of them inflict great hardships on individuals; and all of them suspend or abrogate the law of the land in particular instances, and for special purposes. All of them, therefore, authorize the doing of acts wholly illegal by the ordinary course of the common and statute law, and most of them authorize acts to be done wholly inconsistent with all natural right.

5. That while the most trifling question arising between parties on the state of disputed facts or the application of known laws to these facts, must in this and indeed in every country enjoying the blessings of regular governments, come before tribunals qualified by the learning, skill, and experience of the judges composing them, to deal with such comparatively easy questions, the oftentimes much much more important and much more difficult questions raised by the consideration of private bills only come before committees of both Houses, on which professional and experienced men hardly ever sit, and which are wholly composed of persons who can have no experience to guide them, inasmuch as each can only sit on one or two cases in the course of a session.

6. That the individual responsibility of the judges who compose the ordinary

tribunals of this and all well-governed states affords a security eminently necessary for enforcing the due administration of justice, and for giving the community full confidence in their decisions,—a security held to be necessary, although it is much more difficult for a judge dealing with the known and fixed rules of the law to swerve from his duty and pervert that law to the purposes of injustice, than it is for men who are called upon to decide on the provisions of a bill professedly creating exceptions to the law for particular purposes, and arbitrarily dealing with rights according to no known and fixed rules or principles whatsoever.

7. That in committees of the two Houses, and dealing with interests often-times incomparably more important than ever come before courts of justice, the members, guided by no fixed rules, changed in each case, unknown to the community, not acting in the eyes either of a watchful public or a jealous profession, act almost wholly without any individual responsibility, nor can be prevented, as judges are, at least in this country, from privately seeing parties behind each other's backs, and proceeding upon information, and listening to reasons, and yielding to motives of a private and personal nature.

8. That the great and increasing mass of private bill business renders it still more difficult for the two Houses of parliament to transact such business in a manner at all satisfactory, and that the attempt to transact it proves highly prejudicial to the general political and legislative business of the country.

9. That the delay, vexation, and expense unavoidable in the present mode of transacting, or endeavouring to transact, such private business lays a heavy burthen upon the parties applying for private acts, and on the parties opposing them.

10. That it is nevertheless inexpedient, in a constitutional view, for Parliament, or either of the Houses thereof, to abdicate its functions and privileges in respect of private legislation; but, on the contrary, that both the Houses ought jealously to retain their undoubted power of deciding upon every proposed enactment, and of assenting to or dissenting from such proposal.

11. That it is highly expedient that the said Houses should obtain the aid of some other tribunal, which may enable them to transact the private bill business both more expeditiously, more economically, and more satisfactorily, without at all infringing upon the undoubted privileges of Parliament, or parting at all with the control of each House over each enactment.

12. That, with this view, it is expedient to form a court or board apart from, and independent of, the High Court of Parliament, except as regards the removal of its members by a joint address of both Houses.

13. That this court, or board, should consist of five members, appointed by the crown, and so paid for their services that the crown may always obtain the aid of the most respectable members of the legal profession in constituting such board.

14. That until it be seen how far the said number of commissioners may suffice, or may prove too great, it is expedient, in the first instance, to appoint as two of the members of such court or board either Masters in Chancery or Commissioners of Bankruptcy, in order that, if it be found possible, the three permanently appointed should continue alone to cause an expense to the country.

15. That each House upon receiving any bill, and giving it a first reading, may refer it to the court before whom parties shall be heard, and which shall have the powers of a court of record with respect to oaths, process, and commitment,

and the power of deciding all questions of law, subject to an opinion of one of the four courts in Westminster Hall, in case it shall think fit, and of calling in the aid of a jury on any disputed fact, provided both parties shall agree in asking such issue, and provided the court shall think fit to grant it.

16. That each member of the court shall have power to try all matters, and go through the whole consideration of any bill, so as aforesaid referred by either House of Parliament, and to reserve, if either party require it, and he think fit, any question for the opinion of the whole court, three whereof to be a quorum for this purpose, including the referring member of the court; and that any question being raised on receiving or rejecting evidence, such member may proceed to dispose of it himself, saving, if he think fit, the objection, as above provided, for the opinion of the court.

17. That juries, if an issue be required and allowed as aforesaid, shall be taken from the special jury lists for the county of Middlesex, in such manner and subject to such challenge as in matters before the three courts of law of Westminster Hall.

18. That each member of the board or court shall have the power of giving costs to or against any party at his discretion, and that no review of his order on this matter shall be permitted.

19. That each member of the said board or court shall, at his discretion, and with the consent of all parties, issue a commission for the purpose of taking evidence as to any disputed matter of fact involved in any bill brought before such member, and that the whole expense of such commission shall be defrayed by the parties, under the direction of the member aforesaid.

20. That the bill, having been fully examined by such court or any member thereof, shall be reported to the House of Parliament by which it had been referred, together with such alterations or additions as may have been determined upon as just, fitting, or expedient; and that the said House shall then proceed with the consideration of the bill so reported, and deal with it as such House shall think fit, either adopting the report, or rejecting it, or varying it, as to the wisdom of the House shall seem meet.

21. That the only stage to be omitted by such House on passing such reported bill, shall be the committee and the report.

22. That if any party shall oppose such reported bill before either House, it shall be in the power of the House before which such opposition shall be offered, to award the costs of resisting such opposition, to be paid by such opposing party to the other party or parties.

23. That it shall be lawful for the court or board, by a majority of its members, to make rules and regulations for its proceedings, a copy whereof shall be laid before both Houses of Parliament within one week after their being framed, or, if in vacation time, within one week after the commencement of the ensuing session, and that such rules and regulations shall be deemed and taken to be valid for guiding its proceedings, unless either House of Parliament shall make any resolution against them or any part thereof, which resolution shall be imperative on the said court or board, and new rules shall be made by it in compliance with such resolution; the new rules to be laid before both Houses, as before, within one week after they are framed; and these new rules shall be valid to regulate the proceedings of the said court or board, unless and until a resolution of the other House shall disapprove thereof in whole or in part.

24. That the court or board, shall have the requisite number of registrars and clerks to assist its members, under the superintendence of the Lords Commissioners of the Treasury.

ART. III. — THE LAW OF ESTATES.

CHAP. II.—ESTATES IN FEE TAIL.

WE shall adopt the same arrangement in treating of estates tail, as we pursued with respect to estates in fee-simple, and propose to inquire, *first*, what an estate in fee-tail is: *secondly*, how this estate may be acquired: *thirdly*, how it may be held or enjoyed: and *fourthly*, how it may be aliened.

First, — What an Estate tail is. And here we shall notice in what property it may exist. In our first chapter¹ we have seen that there were estates in fee-simple, and qualified or base fees. Previous to the statute 13 Edward I., known as the statute *De Donis Conditionalibus*, there was also the estate in fee-simple *conditional*. The practice of *entailing* estates, that is to say, the settling lands on a particular class of descendants, seems to have been as old at least as the time of Alfred²; but the particular kind of estate known in our law as an estate tail, owes its existence to the statute *De Donis*. Before this statute became law, if an estate were limited — and such limitation were common — to a man and the heirs of his body, he took an estate in fee-simple, on condition that he had heirs of his body: and on the happening of this event he took an estate which for most purposes was as if the lands had been limited to him and his heirs. But if he had no child, or if, after its birth, no alie-

¹ *Ante*, p. 39.

² Entails were in frequent use, particularly in grants of benefices. They were probably of Roman origin, for the Romans had been much in the habit of entailing lands by way of *fidei commissa* on their children and their freedmen and descendants, with an express restriction against alienation. Alfred enacted that, in order to render the estate so limited inalienable, the instrument of settlement should be declared before the kindred in the presence of the king and the bishop; and, that being done, the will of the donor was ordered to be observed. Spence, Eq. Jur. p. 21.; and 2 Bla. Com. 110. See as to the *feudum talliatum* 1 Cru. Dig. 75., where also (75—77.) a clear account is given of the fee conditional.

nation were made, the lands on the failure of the designated heirs, reverted to the donor and his heirs. But as soon as the grantee had issue born, his estate was supposed to become absolute by the performance of the condition, (which having been performed, was thenceforth entirely gone,) at least for three purposes: 1. To enable the tenant to alien the land, and thereby to bar, not only his own issue, but also the donor of his interest in the reversion. 2. To subject the tenant to forfeit it for treason. 3. To empower him to charge the land with rents, commons, and certain other incumbrances so as to bind his issue. No sooner was the issue born than the tenant in tail took care to alien, and afterwards repurchased the land, which gave him a fee-simple absolute that would descend to the heirs general, according to the course of the common law.¹ It was this power of alienation which was chiefly aimed at by the statute *De Donis*. This power was inconsistent with the views of the great owners of property at that period, and it was accordingly enacted by that statute, "that the will of the donor according to the form of deed of gift manifestly expressed should be observed, so that they to whom a tenement was so given under condition, should not have power to alien the same tenement, whereby it should not remain after the death of the donee to his issue, or to the donor or his heir, if issue failed."

This statute only repeated what the law of tenures had said before, that the tenor of the grant should be observed; and therefore the judges in the construction of it held, that where an estate was limited to a man and the heirs of his body, the donee should not in future have a conditional fee, but divided the estate by creating a particular estate in the donee, called an estate tail, subject to which the reversion remained in the donor.² In consequence of this construction estates thus limited are not conditional; nor is the right of entry of the donor on failure of issue of the donee considered as arising from a breach of the condition, but as a right of reverter accruing to the donor.³

An estate tail then may be described to be an estate of

¹ 2 Bla. Com. 111.

² 1 Burr. R. 115.; Plowd. 248.

³ Litt. s. 19.; Co. Litt. 22 a.

inheritance, deriving its existence from the statute *De Donis Conditionalibus*, which is descendible to some particular heirs only of the person to whom it is granted, and not to his heirs general. It is called an estate tail or a fee tail, from its similarity to the *feudum talliatum*, which appears to have been well known at that time, as it is mentioned in the forty-sixth chapter of this statute, where, in enumerating several kinds of estates, it is said, — “*ad terminum vitæ, vel annorum, vel per feudum talliatum.*” And note (says Littleton, s. 18.), that this word *talliare* is the same as to set to some certainty, or to limit to some certain inheritance; and for that it is limited and put in certain what issue shall inherit by force of such gifts, and how long the inheritance shall endure; it is called in Latin, — “*Feudum talliatum, i. e. hæreditas in quandam certitudinem limitata.*”¹

We have seen² that in consequence of the statute *Quia emptores*, where a person conveys away his whole estate, he cannot reserve any tenure to himself; but this statute only extends to those cases where the entire fee-simple is transferred. Therefore, where a tenant in fee-simple grants an estate tail out of it, the tenant in tail will hold of the donor, and not of the chief lord.³

Estates tail are of two kinds, tail general and tail special “Tenant in tail general is when lands or tenements are given to a man and to his heirs of his body; and in this case if the tenant hath many wives, and by every of them hath issue, yet any one of these issues by possibility may inherit the tenements by force of the gift, because every such issue is by his body engendered. Tenant in tail special is, where lands or tenements are given to a man, and to his wife, and to the heirs of their two bodies begotten. In this case none shall inherit by force of this gift but those that be engendered between them two. And it is called special tail because if the wife die and he taketh another wife and have issue, the issue of the second wife shall not inherit by force of this gift, nor also the issue of the second husband if the first husband die.”⁴ In the same manner it is where tenements are given by one man to another with a wife (which is the daughter or

¹ 1 Cru. Dig. 79.

² *Ante*, p. 36.

³ Co. Litt. 23 a.; Plowd. 237.; 1 Cru. Dig. 81.

⁴ Litt. s. 14, 15.]

cousin to the giver), in frank marriage (before or after marriage)¹, which gift hath an inheritance by these words (frank marriage) annexed unto it, although it be not expressly said or rehearsed in the gift, that is to say, that the donees shall have the tenements to them and to their heirs between them two begotten. But this kind of gift with the learning respecting it, is now obsolete.

There are divers other estates tail, though they be not by express words specified in the statute, but they are taken by the equity of the statute. As if lands be given to a man and to his heirs male of his body begotten, in this case his issue male shall inherit, and the issue female shall never inherit.² It is the same if lands or tenements be given to a man and to his heirs female of his body begotten; in this case his issue female shall inherit by force of the gift and not his issue male. For in such cases of gifts in tail, the will of the donor ought to be observed.³ When lands are given to a man and to the heirs male of his body, and he has issue two sons and dies, and the eldest son enter as heir male and has issue a daughter and dies, his brother shall have the land and not the daughter, for that the brother is heir male.⁴ And if lands be given to a man and to the heirs male of his body, and he has issue a daughter who has issue a son and dies, and after the donee dies, in this case the son of the daughter shall not inherit by force of the entail, because whosoever shall inherit by force of a gift in tail made to the heirs male ought to convey his descent wholly by the heirs male.⁵

In the same manner it is when lands are given to a man and his wife, and to the heirs male of their two bodies begotten.⁶ If tenements be given to a man and to a woman being not his wife, and to the heirs male of their two bodies, they have also an estate tail albeit they be not married at that time; and so it is if lands be given to a man which hath a wife, and to a woman which hath a husband, and the heirs of their two bodies, they have presently an estate tail

¹ Dy. 147.; Co. Litt. 21 b. 176 a.

² Litt. s. 22; Co. Litt. 24 b.

³ Litt. s. 24.; Co. Litt. 25 a.

⁴ Litt. s. 21.; Co. Litt. 24 a.

⁵ Litt. s. 23.; Co. Litt. 24 b.

⁶ Litt. s. 25.; Co. Litt. 25 b.

for the possibility that they may marry.¹ But if lands be given to a man and two women, and the heirs of their bodies, in this case they have a joint estate for life, and every of them a several inheritance, because they cannot have one issue of their bodies. And the same law is where land is given to two men and one woman, and to the heirs of their bodies begotten.²

But it should be noted that an estate tail will descend as well to the half blood as to the whole blood, and that before the recent statute altering the law as to descents.³

“Tenements (*tenementa*),” says Lord Coke⁴, “is the only word which the said statute of Westm. 2. that created estates tail useth, and it includeth not only all corporate inheritances which are or may be holden, but also inheritances issuing out of any of those inheritances or concerning or annexed to or exercisable within the same, though they lie not in tenure, therefore all these without question may be entailed. But if the grant be of an inheritance merely personal, or to be exercised about chattels, and is not issuing out of land nor concerning any land or some certain place, such inheritances cannot be entailed because they savour nothing of the realty.’ But Lord Coke adds, “Examples which illustrate and make this learning clear,” and he proceeds⁵ to give the following: “The office of Marshall of England entailed, charters entailed, use entailed, nomination to a benefice entailed. Also a name of dignity may be entailed within the statute, as dukes, marquesses, earls, viscounts, barons, because they be named of some county, manor, town, or place. But if I grant to a man and to the heirs of his body to be a keeper of my hounds or master of my horse or such like with a fee therefor, yet these cannot be entailed within the first statute, for that these be not issuing out of tenements nor annexed thereto, or exercisable within or concerning lands or tenements of freehold or inheritance, but concerning chattels, and savour nothing of the realty. And so it is if I by my deed for me and my

¹ Co. Litt. 25 b.

² Co. Litt. 15 b. ; 3 & 4 W. 4. c. 106. s. 9.

⁴ Co. Litt. 19 b. 20 a.

⁵ Ibid.

⁵ Co. Litt. 20 a.

heirs grant an annuity to a man and the heirs of his body ; for that only chargeth my person and concerneth no land, nor savoureth of the realty. In all these cases he hath a fee conditional, as there were before the statute, and the grantee by his grant or release may bar his heir, as he might have done at the common law, for that in these cases he is not restrained by the statute." So that the fee simple conditional still exists in all kinds of property which are not included in the statute.

But not only must the estate, to come within the statute, savour of the realty, it must also be an estate of inheritance. Therefore, neither estates *pur auter vie* in lands, though limited to the grantee and his heirs during the life of *cestui que vie* nor terms for years, are entailable any more than personal chattels, because, as the latter, not being either interests in things real or of inheritance, want both requisites ; so the two former, though interests in things real, yet not being also of inheritance, are deficient in *one* requisite. However estates *pur auter vie*, terms for years, and personal chattels may be so settled as to answer the purposes of an entail, and be rendered inalienable almost for as long a time as if they were entailable in the strict sense of the word. Thus estates *pur auter vie* may be devised or limited in strict settlement by way of remainder, like estates of inheritance ; and such as have interests in the nature of estates tail may bar their issue, and all remainders over, by deed unenrolled, of the estate *pur auter vie*, as those who are, strictly speaking, tenants in tail may now by deed enrolled ; but then the having of issue is not an essential preliminary to the power of alienation in the case of an estate *pur auter vie* limited to one and the heirs of his body, as it is in the case of a conditional fee¹ ; and in equity this quasi entail may be barred by articles.² A copyhold estate cannot be entailed by virtue of the statute, for that would tend to encroach upon and restrain the will of the lord ; but, by special custom of the manor, a copyhold may be limited to

¹ Harg. n. 5. ; Co. Litt. 20 a.

² 1 Atk. 523. ; 2 Vern. 225. ; 1 Bro. P. C. 457. ; 2 Bla. Com. by Stewart, 131. ed. 3.

the heirs of the body, for here the custom ascertains and interprets the lord's will.¹

As to inheritances merely personal, which neither issue out of or relate to land, or some certain place, and which are not demandable *ut tenementa* in a præcipe, they cannot be entailed within the statute *De Donis*. So that, when things of this nature are limited to a person and the heirs of his body, the donee takes a conditional fee; and may dispose of the property as soon as he has issue.²

An annuity which only charges the person of the grantor, and not his lands, though it may be granted in fee, cannot be entailed. In a modern case, Lord Hardwicke held that an annuity in fee simple, granted by the crown out of the four-and-a-half per cent. duties payable for imports and exports at the island of Barbadoes, was merely a personal inheritance, not entailable within the statute *De Donis*; therefore, that being settled upon A. and the heirs of his body, it was a conditional fee at common law; so that A., having issue, might alien it, and thereby bar the possibility of reverter.³

It was also held by Lord Thurlow, in a modern case, that an annuity granted by act of parliament out of the revenues of the post-office, redeemable upon payment of a sum of money, to be laid out in land, was a personal inheritance only, not entailable within the statute *De Donis*; for that, notwithstanding the power reserved to the crown of laying it out in land, the parties had a right to treat it as an annuity; and the Court of Chancery would not keep the objection of its being land in contemplation from century to century, because of the possibility of substituting the money in the place of the annuity.⁴

II. Let us inquire, *secondly, how an estate tail may be acquired*. This estate may be acquired either by deed or will, or it may descend to the heir in tail. In gifts in tail

¹ 3 Rep. 8.; Doe v. Clark, 5 B. & Ald. 458.

² Co. Litt. 20 a.; 1 Cru. Dig. 82.

³ Stafford v. Buckley, 2 Ves. 170.

⁴ Holderness v. Carmarthen, 1 Bro. C. C. 377.

the word *heirs* is as necessary as in feoffments and grants¹; seeing every estate tail was a fee simple at the common law, and at the common law no fee simple could be in feoffments and grants without the word *heirs*, and that an estate in fee tail is but a restrained fee, it follows that in gifts in a man's life-time no estate can be created without the word *heirs* unless it be in the case of frank-marriage. And when Littleton says *heirs* yet heir in the singular number, in a special case, may create an estate tail.² The words "of his body," are not so strictly required, but that they may be expressed by words that amount to as much, for the example that the statute of Will. II. putteth hath not the words *de corpore*, but these words *hæredibus*, viz. *cum aliquis dat terram suam alicui viro et ejus uxori et hæredibus de ipsis viro et muliere procreatis*. If lands be given to B. *et hæredibus quos idem B. de primâ uxore suâ legitime procrearet*, this is a good estate in special tail (albeit he hath no wife at that time) without these words *de corpore*.³

Still the words *of his body*, or some other words of procreation are essential to make an estate in tail, and ascertain to what heirs in particular the fee is limited. A grant in a deed to a man and his issue, to a man and his seed, to a man and his children or offspring, all these are only estates for life, as there wants the words of inheritance, *of his heirs*; and so also a gift to a man and his heirs male or female, is an estate in fee simple, and not in fee tail, for there are no words to ascertain the body out of which they shall issue.⁴ If the gift be to a man and his heirs, and if he die without issue, then to another this is a good limitation of an estate tail⁵; and this as well in a deed as a will. Limitations of estates tail in wills are viewed with the same indulgence that we have seen is extended to limitations of estates in fee.⁶ Thus a devise to A. and his seed will give A. an estate tail general⁷, and a devise to A. and his heirs male gives him an

¹ See *ante*, p. 40.² Co. Litt. 20 a. 20 b.³ Co. Litt. 20 b.; and here Lord Coke gives several other similar instances.⁴ Litt. s. 31.; Co. Litt. 7 a.; 2 Bla. Com. 115.⁵ 1 P. Wms. 57 z.⁶ *Ante*, pp. 40, 41.⁷ Co. Litt. 9 b.

estate in tail male.¹ But in wills governed by the late Wills Act², the words *die without issue*, or *die without leaving issue*, or *have no issue*, or any other words which import either a want of, or failure of issue of any person in his life-time, or at the time of his death, or an indefinite failure of his issue shall be construed to mean a want or failure of issue in the life-time, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will by reason of such person having a prior estate tail, or of a preceding gift being without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise.

Where tenements are devised to two persons severally in tail, or the same tenement to two as tenants in common in tail, and upon failure of their issue to a third person, with an apparent intention that he should take the whole at once, cross remainders between the two first devisees are to be implied; *i. e.*, it is to be understood that each takes a vested remainder in tail expectant upon the other's estate.³ But cross remainders will not be implied as to limitations contained in a deed.⁴

III. *Thirdly.* We shall next state the principal rules as to the manner in which *an estate tail may be held or enjoyed.*

All natural persons, capable of holding estates of inheritance in land, may be tenants in tail. And it was solemnly determined in 4 Eliz. that the king was within the statute *De Donis*, as well as a common person; because the statute was made to remedy the error which had crept into the law, that the donee had the power of alienating an estate given to him, and the heirs of his body, after issue had, and to restore the common law, in this point, to its right and just course; which it did, by restoring to the donor the observance of his intent. And when the statute *De Donis* ordained that the

¹ Co. Litt. 27 b. It appears undesirable in this place to enter into a minute discussion of the cases in which particular expressions in wills have or have not been construed into limitations of an estate tail. They are to be found accurately distinguished in Mr. Jarman's Treatise on Devises.

² 1 Vict. c. 26. s. 29.

³ Cowp. 780.; Doe v. Cooper, 1 East, 229.; Burt. Comp. 250.

⁴ Edwards v. Alliston, 4 Russ. 78.

will of the donor should be observed, it made his will to be a law, as well against the king, as against another.¹

As a tenant in tail has an estate of inheritance, he has a right, without barring the entail, to commit every kind of waste; by felling timber, pulling down houses, opening and working mines, &c. But this power must be exercised during the life of the tenant in tail, for, at the instant of his death, it ceases. If, therefore, a tenant in tail sells trees growing on the land, the vendee must cut them down during the life of the vendor, otherwise they will descend to the heir as parcel of the inheritance.²

The Court of Chancery will not, in any case whatever, restrain a tenant in tail from committing waste. Thus, Lord Talbot is reported to have said that in Mr. Saville's case, who being an infant and tenant in tail in possession, in a very bad state of health, and not likely to live to full age, his guardian cut down a quantity of timber just before his death: the remainderman applied for an injunction to restrain him, but could not prevail.³

So, if a tenant in tail grants estovers to another on the restoration of his woods, those grants determine with his death; for, as they are charges on the inheritance, so they must necessarily cease when his power who granted them is determined.⁴

Estates tail are subject to the curtesy of the husband, and the dower of the wife, which are incidents inseparably annexed to them.⁵

It is a well known rule of law, that whenever a particular estate in land vests in the person who has the fee simple in the same land, such particular estate is immediately drowned or merged in it. In consequence of this principle, if an estate had been given before the statute *De Donis* to A. and the heirs of his body, if the fee simple was limited to A. by the same conveyance, or came to him afterwards, the estate

¹ Plowd. 227. ; 7 Rep. 32. a ; 1 Cru. Dig. 83.

² Plowd. 259. ; 11 Rep. 50. a ; 1 Cru. Dig. 84.

³ Cas. Temp. Talbot, 16. ; Mos. R. 224. ; 1 Cru. Dig. 84.

⁴ 1 Roll. Abr. 841. ; 2 Crabb's R. P. 47.

⁵ 2 Bla. Com. 116.

tail would have become merged. But it was determined by the Judges in the reign of Edward III., that an estate tail could not be merged, surrendered, or extinguished, by the accession of the greater estate. So that a man may have at the same time, and in his own right, both an estate tail, and the immediate reversion in fee simple, in the same land.¹

The reason of this determination was, that the object of the statute *De Donis* being to render estates tail unalienable, if they were allowed to merge in the fee simple, an obvious mode of destroying them might have been adopted by the tenant in tail's purchasing the reversion. This rule as to merging does not apply to an estate tail after possibility of issue extinct, as we shall hereafter see.

Tenant in tail having an estate of inheritance has a right to all deeds and muniments belonging to the lands; which the Court of Chancery will order to be given up to him.²

Tenant in tail having only a particular estate, and not the entire property, he is not bound to pay off any charges or incumbrances affecting the estate. But where a tenant in tail does pay off an incumbrance charged on the fee simple, the presumption is that such payment was made in exoneration of the estate; because he may, if he pleases, acquire the absolute ownership. But the tenant in tail may, by taking an assignment of the incumbrance to a trustee for himself, or by several other acts, charge the estate with the payment of such incumbrance.³

The issue in tail is not bound to pay off any incumbrances affecting the estates; but where he does so without taking an assignment the estate is exonerated.⁴

Lord Coke⁵ says, "if an estate be made, either before or since the statute of 27 Hen. 8. c. 10. to a man and the heirs of his body either to the use of another and his heirs, or to the use of himself and his heirs, this limitation of a use is utterly void, for before that statute he could not have ex-

¹ Plowd. 296.; 2 Rep. 61 a.; 1 Cru. Dig. 86.

² 2 P. Wms. 471.

³ Jones v. Morgan, 1 Bro. R. 206.; 1 Cru. Dig. 85.

⁴ Kirkham v. Smith, 1 Ves. 258., and cases there cited.

⁵ Co. Litt. 19 b.

ecuted the estate to the use;" but this is certainly not the received opinion on this subject, and there seems no good reason for holding that a tenant in tail may not be seised to a use.¹

IV. *Fourthly, how a fee tail may be aliened.* — We have seen that it was the intention of the framers of the statute *De Donis* to prevent all alienations by a tenant in tail of his estate: and we have now to show how completely those intentions have been defeated. The mode which the statute took was not peremptorily to annul the alienations made by tenants in tail, but to forbid that the issue should be disinherited by them. But it did not determine in what manner the disinheritance should be prevented, whether by giving a right of entry to the heir, or by merely reserving to him that right of action (formedon in the descender) which is specified in the statute.² The formedon has shared the fate of most other real actions, and has been abolished.³

The feoffment or fine of a tenant in tail of land in possession, by virtue of the entail, caused a *discontinuance* of the entail, whereby the issue and the persons in remainder and reversion were put to their formedons⁴, but fines have been entirely abolished⁵, and a feoffment made after the 1st day of October, 1845, has no tortious operation.⁶ And further, by stat. 3 & 4 W. 4. c. 27. s. 29. no discontinuance made after the 31st of December, 1833, shall defeat any right of entry or action for the recovery of land.

There might also have been a discontinuance by the obligation of a warranty descending on the person entitled under the entail.⁷ Thus, if a tenant in tail were disseised and then released his right to the disseisor, with a clause of warranty against himself and his heirs, and afterwards died, his eldest son was not allowed to enter upon the land, but must have brought his action of formedon in order to give the disseisor an opportunity of pleading the warranty. But by stat. 3 & 4

¹ Plowd. 557.; Seymour's case, 10 Co. 95.; Bac. Read. on Uses, 57.;

² Crabb's Real Prop. 42.

³ Burt. Comp. 251.

⁴ 3 & 4 W. 4. c. 27. s. 36.

⁵ Litt. ss. 595, 596, 597.

⁶ 3 & 4 W. 4. c. 74.

⁷ 8 & 9 Vict. c. 106. s. 4.

⁸ Co. Litt. 328 b. 329 a.; Doe v Jones, 1 C. & J. 528.

W. 4. c. 74. s. 14. all warranties of land made after the 31st of December, 1833, by tenant in tail shall be void against issue in tail and all persons whose estates are to take effect after the determination or in defeasance of the estate tail.

But the most common and effectual mode by which a tenant in tail could cut off the heirs in tail, and the persons in remainder or reversion, and convert the estate into a fee simple, was by suffering a common recovery. The efficacy of this assurance for these purposes depends entirely on the doctrine of warranty, and (to use the words of a recent writer¹) on such a bold application of that doctrine as no court of justice under the control of due responsibility would have ventured originally to make. It may, indeed, without much exaggeration be affirmed, that in the reign of Edward IV., the principal enactment of the statute *De Donis* was repealed by a judicial sentence. This virtual repeal of the statute has now been completely carried out by the stat. 3 & 4 W. 4. c. 74. by which recoveries were abolished, and a deed enrolled in Chancery substituted under certain restrictions in their place.

The effect of a common recovery is to convert the estate tail on which it operates into a fee simple, as absolute as that out of which it was at first derived. The recovery must, therefore, defeat not only the remainders and reversion which are expectant on the natural exposition of the estate tail, but also all shifting uses, or executory devises to which it was subjected in its creation.²

Although, as we have seen³, dignities and titles of honour may be entailed, yet neither the donee nor his issue can bar the entail.⁴

¹ Burt. Comp. 258. Blackstone (2 Com. 117.) says that Edward IV. suffered Taltarum's case to be brought before the Court to remedy the inconvenience and injustice which had been occasioned by the statute *De Donis*. Mr. Spence (1 Eq. Jur. 143.) says, "the Judges in the reign of Edward IV. took upon themselves, in the exercise of their prætorian authority, individually to establish that such a proceeding [as a recovery] should be a bar to an estate tail." Whether the monarch or his Judges took the initiative in this proceeding, it is certain that the legislature did not interfere with the decision.

² 2 Salk. 570.; Burt. Comp. 268.

³ See ante, p. 281.

⁴ Purbeck's case, 1 Show. P. C. 1.

A tenant in tail might always make leases for any term of years, which, during his own life, would be valid and indefeasible, and after his death, if the estate tail continued, would still subsist unless defeated by the entry of the heir; and if such heir, instead of entering, accepted rent from the lessee, the former was placed in the situation of lessor.¹ By stat. 32 H. 8. c. 28., leases for twenty-one years or for three lives are valid as against the issue, if the provisions of that statute are complied with, and now under the stat. 3 & 4 W. 4. c. 74., the tenant in tail may by disposition under that act, with the necessary consents make leases for any term of years, and unrestrained by any condition; and even if the lease be made by such disposition but without the necessary consents, it will be good against the issue in tail.²

It should be observed that the power of disposition given by stat. 3 & 4 W. 4. c. 74., does not extend to tenants in tail after possibility of issue extinct (see s. 18.).

Another peculiarity of an estate tail was, that it was not forfeited for treason. But when once the rights of the issue and the remainderman could be barred, the Crown soon determined not to be cut out. Henry VIII., according to Blackstone³, found that notwithstanding Taltarum's case, the practice of re-settling estates tail in a similar manner to suit the convenience of families prevailed, and had address enough to procure a statute (26 Hen. 8. c. 13.), whereby all estates of inheritance (under which general word estates tail were covertly included), are declared to be forfeited to the king upon any conviction of high treason, and by stat. 33 Hen. 8. c. 20., estates tail are forfeited by all manner of attainders of treason.

By stat. 33 Hen. 8. c. 39. s. 75., the issue in tail were made liable to crown debts. The last material alteration which has recently taken place with respect to estates tail, is the render-

¹ Co. Litt. 45 b, 46 a.

² 3 & 4 W. 4. c. 74. s. 15.; Burt. Comp. ed. 5. 279. n. By s. 41. enrolment is not necessary to any lease for any term not exceeding 21 years, to commence from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack-rent, or not less than five-sixths part of a rack-rent.

³ 2 Com. 118.

ing them liable to other debts. We have very recently stated the law on this point as it respects estates in fee simple.¹ But estates tail are not bound by any of the statutes there mentioned except one. By the statute 1 & 2 Vict. c. 110. s. 13., it is enacted that a judgment duly entered up in any of the superior courts at Westminster against any person, shall operate as a charge on all his real estate, "of or to which such person shall at the time of entering up such judgment, or at any time afterwards be seised, possessed, or entitled for any estate or interest whatever at law or in equity, in possession, reversion, remainder, or expectancy, or over which such person shall have any disposing power," and shall be binding on the issue of his body and all other persons whom he might without the assent of any other person have barred; and by s. 16. decrees and orders of courts of equity shall have the effect of judgments.

The present state of the law as to the power of alienation of tenant in tail is thus concisely stated by a recent writer.² "The tenant in tail is now enabled to alienate his lands and tenements by deed founded on the late statute either absolutely or by way of mortgage³, and thereby to defeat the interest as well of his own issue though unborn, as also of the remainderman or reversioner, even when the reversion is vested in the crown, except the estate tail be granted for public services, or the tenant in tail is expressly restrained by act of parliament from barring his estate; secondly, he is now liable to forfeit them for high treason and on bankruptcy; thirdly, he may charge them with reasonable leases; and lastly, they are now liable to the payment of his debts on a judgment or decree obtained against him."

In conclusion, perhaps we may say that Littleton's⁴ definition of an estate tail, that tenant in tail is by virtue of the statute of Westminster the Second, is no longer correct, inasmuch as that statute has now in effect been almost entirely repealed.

By the stat. *De Donis*, the donee is only expressly prohibited from aliening, and no mention is made of the issue in

¹ *Ante*, p. 45.

² 2 Stewart's Bla. 138. ed. 3.

³ 3 & 4 W. 4. c. 74. ss. 15. and 21.

⁴ S. 13.

tail, but it has been very early decided that the issue shall not be at liberty to alien to the prejudice of his issue¹, and this law is expressly left unaltered both by stat. 3 & 4 W. 4. c. 74. s. 20., which extended the powers of alienation by tenant in tail, and 8 & 9 Vict. c. 106, s. 6., which renders contingent interests alienable.

ART. IV.—CONTROVERTED ELECTIONS.

7 & 8 Vict. c. 103. *An Act to amend the Law for the Trial of Controverted Elections of Members to serve in Parliament.*

WE have already expressed our opinion that the legislative business of this country would be far better managed if parliament were to follow the practice of early times, confine itself to general legislation, and not interfere, by act or vote, with matters of private contention. What can be farther from the ends for which parliament was instituted, or a greater impediment to the progress of legislation, than to have the 657 gentlemen of the House of Commons sitting in solemn conclave to decide whether John à Nokes had received parochial relief, or had paid his quarter's poor's rate? or those 657 gentlemen, and the dukes, marquises, barons, and bishops of the Upper House, and her Majesty herself, and her "most grave and reverend" first council, seriously and solemnly enquiring and determining whether Mrs. Richard Roe had been faithless to her lawful spouse, and whether she ought to be divorced from him, and compelled to live, for the remainder of her days, in a state of concubinage with the guilty author of her ruin? or whether the proper number of heirs, remaindermen, and reversioners had assented to the passing of a private estate bill? or if they had not, why their assent might not be dispensed with? Who can pretend to say that these are proper subjects for the consideration of the legislative body of this empire? or that the

¹ 5 Edw. 2. The citations of this case are given by Mr. Crabb, vol. ii. p. 50.

proper functions of parliament would not be discharged more to the satisfaction and advantage of the nation, if topics such as these were remitted to tribunals really qualified to inquire into them, and which, at least, it would not be ludicrous to see conducting such inquiries?

It must be obvious, that the interference of parliament in matters of contention between private parties, or to relieve particular individuals, in particular circumstances, from the inconveniences arising from the operation of a general law, must be as inconsistent with the real interests of the public, and the proper functions of parliament, as it is with the rights of the individuals who are the unwilling or unassenting objects of such interference. It wastes the time which should be devoted to public business, and causes us to be presented to the world as a people who are doubting and deliberating one half of the year as to what laws we should live under during the other half. It diverts the attention of parliament from the subjects which, alone, they are summoned to consider—those touching the state and welfare of the crown, the realm, and the church. It is of a baneful tendency, in presenting to members of parliament private motives for acting in their public capacity. It subjects individuals to be deprived of their rights in a manner inconsistent with every principle of justice, that is, by the vote of the odd man in the division of a political assembly. It tends to prevent the progressive adaptation of the law to the wants of the community; for it may be believed that if parliament had entertained a proper view of its own end and functions, and had from the first refused to interpose its omnipotence in the manner acceptable to those who were rich enough to pay for its interference in private affairs of all kinds, from putting an end to the domestic squabbles of Mr. and Mrs. Roe, or overthrowing a family settlement, to protecting a gambling transaction, and defeating a common informer, the rich and the noble would have long since joined with the other portions of the community in making the law suitable alike to the wants of all; and attempts to amend it would not have been denounced as revolutionary assaults on the time-honoured institutions of the realm,

It is inconsistent with that first principle of expediency, common sense and justice, which has governed the legislatures of every civilized country of which we have ever heard, namely, that the legislature should never, except in some great public emergency, and on the ground of public interest, legislate for or against individuals. Moreover, a parliamentary inquiry is not the mode of trial which the constitution has pointed out for determining the controversies of individuals. The House of Commons cannot swear a witness, and therefore wants one of the first requisites of a tribunal qualified to discover on which side of two conflicting statements the truth lies. The idea of the Sovereign and the Great Council examining witnesses on oath to ascertain whether the preamble of a bill was proved, has never been entertained. Therefore two of the three bodies whose concurrence is necessary to the passing of a bill, must dispose of the rights of parties in a way unknown to the ancient law of this realm—on belief, unsworn statements, and hearsay; and the third is a body before whom a commoner ought not to be called to answer, who cannot try him, and who have no jurisdiction to determine any of the matters on account of which private bills are allowed to pass.

We should go farther, and say that we should be disposed to doubt the constitutional *right* of parliament to interfere in private matters, as it has been now for more than a century in the habit of doing. Take for instance a divorce bill.—John and Joan marry, taking each other for better or worse, and well knowing that as the law stands, whatever may be their offences towards each other the law will not divorce them, and that they will be man and wife till death, and death only parts them. Such is the contract between them. Joan proves faithless to her marriage vows, and relying on the law and the contract insists on her rights as a wife, while he, if he be rich enough, implores parliament to interfere. Now what right has parliament to meddle in this squabble? It is not a question of national importance. No one can say if they refuse to interfere, *actum est de republica*. It is not one of the “arduous and urgent affairs concerning us and the state, and defence of our said united kingdom and the

church," on which, and which alone, her Majesty has summoned them to consult. It is not within the scope of their commission. It does not concern the crown, the realm, or the church. It is not a public question, much less a national one, and therefore a national body met for national purposes only, ought not, and have no *right* to meddle with it — and when they do meddle with it it is merely by an abuse of the power with which they are entrusted for very different objects. But meddling with it, what *right* have they to say to Joan, "You rely upon the law and your contract, but we, in *your* particular case, and to punish *you*, will pass a bill to repeal the law so far as *you* are concerned, to deprive *you* of the benefit of *your* contract, and to divorce *you*? What possible *right* can they have to do all this? What *right* have they to divorce her more than they have to hang her? They have exactly as much *right* to do one as the other — and if the public feeling were with them might do the one with as much propriety as the other ; and few we think can doubt that, if private divorce bills had been known in the time of the Commonwealth, the parliament that made adultery a capital crime would not have hesitated to insert a clause in a divorce bill for the wife's execution. Take again the case of a private estate bill. — By a general statute parliament removes the restraints on strict entails which the common law had provided, and so far as the mass of the community is concerned, makes the most stringent settlements secure ; but when a person of great wealth or influence finds himself hampered by the limitations under which an estate has descended to him, they at once release him from the operation of the general law, passing a special act for his special benefit. Can any thing be more unprincipled, unconstitutional, or iniquitous? A. B. is in possession of an estate, and devises it to C. D. under certain limitations, which, as the law now stands, are not capable of evasion. It is clear that C. D. should take the estate liable to those limitations or not at all. The will of A. B. is his only title, and that should be obeyed to the letter. But he enters into possession, and if he have money and influence gets parliament to dispense in his favour with the general law, and to allow him to set at defiance the limitations and conditions under which he should hold.

Instances of this kind are of continual recurrence. A late Scotch duke was enabled by act of parliament to borrow 100,000*l.* on an estate on which otherwise he could not borrow a shilling. Can any thing be more preposterous? What *right* have parliament to interfere in one individual case and say, "Here the general law must yield to our particular wishes. Here we will set aside the conditions on which our friend got this estate, and give him what the devisor did not mean to give him, and rob the next heirs of entail of what by law and right belongs to them." Can any thing be more unjustifiable on principle? If parliament think the general laws as to real property to be on the whole the best for the state, surely it ought not, without some great public object, to exempt individuals from inconveniences which are the necessary consequences of that general law, and from which they have no right to claim exemption, and to deprive other parties of the property to which they would be entitled if the omnipotence of the legislature were not brought thus specially into operation against them. If the general law be good, adhere to it—if not, alter it—but you have no right to make it binding on the poor and humble, but liable to be evaded at will by the rich and powerful; an exact and literal illustration of the Scythian's sarcasm about laws and cobwebs.

If, as it has been said, a husband proving adultery on the part of the wife, and the other circumstances now required to be proved before the passing of a bill, has a right,—is in justice entitled—to a divorce, his obtaining it ought not to be dependent on the vote of a political assembly; parliament ought not to be asked, and ought not to be at liberty to declare whether or not he should receive the redress to which he has a right. They ought not to be at liberty to commit a wrong on him, and to deny or delay right and justice to him unless some extraordinary exigency required them to immolate him for the general safety and welfare of the realm. Nothing can be more inconsistent with all our notions of justice and propriety than to see the several portions of the legislature gravely deliberating whether or not they should give a man that to which he has a right—whether or not they should commit an injustice. It is plain that the proper course for

them to pursue is to pass a general act providing that a party on proving the several circumstances which must now be proved in both Houses prior to the passing of a private divorce bill should be entitled to a divorce, and authorising some particular court to have jurisdiction in such matters. In a recent number of this Review¹ many reasons were urged to show that the Judicial Committee of the Privy Council is the body to which this jurisdiction should be delegated, and to those reasons we have heard no answer.

Next to divorce in the obviousness of the propriety of transferring it to some other than a parliamentary tribunal comes the jurisdiction exercised by the House of Commons in cases of controverted elections. This jurisdiction has been from its first assumption exercised in a manner to reflect anything but credit on that body. Till the passing of the Grenville Act, it was the ready means of making every member dependent for his seat, not on the votes of his constituents, but the nod of the minister and his majority, and that act and every other attempt made up to 1839, to form a decently impartial and efficient tribunal from amongst the members of the House was then admitted to be a total failure. The experiment of 1839 was abandoned in 1844, and the last experiment is not likely to prove more successful than its predecessors. It is impossible that any such experiment should be successful, for there is scarcely a principle recognised in this country as essential to the due administration of justice which it and all its predecessors have not set at defiance. The members of that House should therefore feel that a regard for their own characters, the rights of electors, and, above all, the sacredness of justice forbid them to repeat such experiments, and should induce them to resign a jurisdiction for which the experience of two centuries proves them to be totally unqualified, which up to the last eighty years produced to them nothing but weakness and infamy, and now produces anything but strength and honour. As every attempt to transfer this jurisdiction to some other tribunal is resisted on the ground of its being opposed to what is deemed a fundamental privilege of the

¹ See 1 L. R. p. 376.

House of Commons, we shall analyse the nature, antiquity, and effects of this privilege.

This privilege, as uncontrolled by recent statutes is, that the House of Commons consisting of the members returned by the sheriffs, has a right to decide as a body all questions respecting the election of each of its own members, in the same manner and to the same extent to all intents and purposes, that it decides whether a bill shall pass or a supply be granted, or A. B. or C. D. be its Speaker. Suppose at a general election two sets of rival candidates start for the representation of each of the constituencies of the realm. The sheriffs return one set, perhaps according to law, perhaps according to favour. By this privilege the sheriffs' nominees are instantly constituted the sole judges of each and every return—of the conduct of the sheriffs—of their own rights, the rights of their friends, and the rights of their rivals. Such they literally and practically were prior to the passing of the Grenville Act, when this “ancient, undoubted, and constitutional privilege” was enjoyed in all its integrity.

It may at first sight be perceived that as the determination of elections must, in theory at least, precede the very being of the House of Commons, and as a privilege cannot attach till a body is in existence to exercise it, this judicature cannot be strictly regarded as a privilege of the Commons. Thus did some Members reason in Goodwin's case in 1603:—“The question is not a matter of privilege but of judgment.” “There must be a judge of the return before we sit, and this is now judged according to the positive laws of the realm by the king, which infringeth not our liberty, since we judge, *after the Court is set, according to discretion.*”¹

The arguments on which the claims of the Commons to this jurisdiction are usually supported, are too well known to be noticed in detail. We confess that we cannot see much force in those arguments. We cannot see how it is a matter vitally affecting the House whether A. B. or C. D. is returned for a particular county or borough. We regard it more as a matter of concern between the two bodies of electors. With either candidate the House should not identify

¹ Com. Jour. c. 157.

itself till some other tribunal should have decided who was the person chosen by those to whom the law had entrusted the right of election. If the House assumes the right of determining which candidate is duly elected, it in fact assumes a power of choosing itself, and erecting itself into a nominally representative assembly independent of those whom it calls its constituents. That this anomaly has been heretofore repeatedly carried into practice, we shall presently prove beyond the reach of contradiction.

By recurring to first principles it must be seen that the House cannot constitutionally have any right to determine the legality of the returns of its own members, or in other words, the titles of those who create and bring it into existence. The only requisite to its due constitution is the assent of those who have a right to elect the several members, and that right and that assent must be decided by some tribunal in existence prior to their taking their seats in consequence of the exercise of that right and assent. The right of the people to elect being precedaneous to the right of the Commons to sit in consequence of their election, it seems plain that the tribunal to determine the former must be precedaneous to the existence of the latter.

It must be equally obvious that this tribunal must be also independent of the Commons. As by the original nature of the constitution every subject has an absolute right to his property and liberty, the franchise is a necessary and inherent accompaniment to it, so that he should not be deprived of either except by the acts of those whom he has chosen to represent him. Hence as this right is secured by laws made prior to the existence of any parliament, or since by the three portions of the legislature, it cannot be destroyed by the arbitrary votes of any one portion, and can be altered only by the joint consent of all three, and as one portion might, under the pretence of deciding it judicially, either alter or destroy it, it should be determined by some tribunal independent of each and every portion of the legislature.

Let us apply these principles to the present question. The three bodies of the state having combined in passing the Reform Act, is it not an usurpation in any one body to assume the exclusive right of interpreting that enactment?

If the Commons have the sole right of determining all questions relative to the return of their own members, why did they require the sanction of the other two portions of the legislature for the measures by which they sought to regulate their elections? And having allowed the Crown and the Lords to exercise the same right of rejection, alteration, and amendment over those as over all other enactments, why not allow a share also in the interpretation of them? Is it consistent with any principle of the constitution that any one portion of the legislature should assume the right of interpreting the acts of all three? Or under the pretence of acting judicially, claim an exclusive right of legislating on particular subjects? The perfection of the constitution is supposed to lie in the separation between the functions of the legislative, executive, and judicial bodies. If any one could assume the functions of the others, British freedom would be approaching a dissolution in the opinion of many who look with great complacency on this privilege. In fine, the franchise being a right conferred by the three bodies of the state, it is a tyranny to rob any subject of it by the irresponsible votes of any one fraction of the state. Those who gave it should at least protect it.

For an illustration of these views we need only refer to any of the election petitions which come so frequently before the House. The party beaten at the poll attempts to disqualify his opponent's voters on a *biased* committee's interpretation of the provisions of the Reform Act or some other act, as in the last Westmeath case, in which the majorities proposed to be cut down on the *beneficial interest* clause, were more than double the numbers polled for the unsuccessful candidates. Is it not obvious that in interpreting those provisions regard should be had not to the views of that Committee or of the present House of Commons, or any or all the portions of the present legislature, but to those of the parliament by which the particular statute was enacted. Nothing can be more monstrous than to allow three members of the present House of Commons to render nugatory an act passed by another Monarch, another House of Peers, and another House of Commons. This privilege reduces the electors of the entire kingdom and particularly those of Ireland to

this enviable position—that by act of parliament they have a right to defend their persons and property by votes in the choice of representatives, but may be deprived of it by the *bias* of a committee; that the law of the land makes them freemen, but that privilege may make them slaves.

On questions of this kind theories can have but little weight, unless supported by authorities. From the time of the assumption of this privilege, in the reign of James I., its nature or extent had not been seriously questioned till the celebrated case of *Ashby v. White* arose, in 1704. This was an action by a voter against the constables of Aylesbury, for refusing to admit his vote at the election, and a verdict, with damages, having been given at the assizes, three judges of the Queen's Bench set it aside on the ground, principally, that the right of judging of matters of election belonged exclusively to the Commons; wisely and properly adding, that for the deprivation of such a trifle as a vote, the law afforded no redress, as *de minimis non curat lex*. Against this doctrine C. J. Holt argued with his usual ability, and his views were afterwards adopted by the Lords in reversing the judgment of the Queen's Bench, and circulated in "The State of the Case upon the Writ of Error," &c. &c. in answer to the Resolutions and Orders of the Commons.

In that document the Lords, re-echoing the opinions of Holt, scout the then current notion, that an elector's right of choosing a representative was founded upon the law and custom of parliament; and say, "It is an original right, part of the constitution of the kingdom as much as a parliament is, and from whence the persons elected to serve in parliament do derive their authority, and can have no other but that which is given them by those that have the right to choose them, a right originally established even before there is a parliament; a man has a right of voting by the common law, and the law having annexed his right of voting to his freehold, it is of the nature of his freehold, and must depend upon it. The same law that gives him his right must defend it for him, and any other power that will pretend to take away his right of voting may as well pretend to take away his freehold;" that to his vote he has "as good a title as to receive the natural profits of his soil;" that as "matters of

freehold are determinable originally and primarily in the Queen's courts, by the rules and methods of the common law, by a jury sworn, and the evidence of witnesses upon oath;" "so are all benefits, rights, and advantages depending thereon or belonging thereto;" that so also are the rights of citizens and burgesses originally and primarily cognisable by the courts of law; and that the power claimed by the House of Commons of deciding the rights of their electors was "indeed to choose their electors."

The House of Lords, acting as a House of Peers, has no jurisdiction over any peer's rights or dignity, unless the King, on a petition, refers the matter to them, which, as he by his prerogative can try his cause in what court he pleases, gives them a jurisdiction which, otherwise, they would not have. "For the King being the fountain of honour, from whence all dignities are derived (for none can be a peer without the King's creation, or his consent by act of parliament; for it is held in Jones's Reports, 104., an ordinance of the House of Lords cannot make a peer), the King hath an interest in the person so dignified for his council in peace and defence in war, as appears in the 7 Rep. 34. and 9 Rep. 49.; and by reason of his great trust and confidence, the honour cannot be taken from the peer or transferred by him, being an incident inseparable to him, without the King's consent."¹

The parallel between this case and that of a commoner is complete. By common right, a man cannot be made a representative without the consent of the people. The several constituencies are the "fountains" whence the rights of the several members are derived; but if the House rejects one member and selects another, it can make or unmake a representative without, or against, the consent of his supposed constituency. A commoner can, no more than a peer, transfer, or divest himself of, the rights conferred on him by those who create him. If an ordinance of the Lords cannot make a peer, how can an ordinance of the Commons make a commoner? And if the Lords cannot try a question of peerage without the consent of him who alone can create a peer, how can the Commons try the rights of a commoner

¹ R. & Reg. v. Knowles, 12 St. Tr.; Skinner, 883—397.

without the consent of the constituency whose election can be his only rightful creation? Prynne, the value of whose researches is universally admitted, who seems to have sought only to maintain the supremacy of law over prerogative and privilege, denies that the members of the Commons have any right to seclude each other, or to try each other's titles; and says that, as *par in parem non habet imperium*, and all are of equal rank and power as attornies or proctors from their different constituencies, they "can no more discharge or reject one another than one attorney, proctor, grand-juryman, juror, justice of the peace, judge, commissioner, or executor can discharge or remove another of his colleagues equally empowered, entrusted, with them, by the parties they represent¹;" and traces to the assumption of this privilege all the outrages on the constitution committed by the Long Parliament and the Protector.

So long as the members of the House of Commons thought it worth while to exact their wages from their constituents, they could not have claimed this privilege; for if they were to vote a person duly elected who had not really been so, as he could not recover his wages except by a writ to the sheriff, and the sheriff could not levy them without the concurrence of the electors in the County Court², and the indentures under their hands and seals, would have left little room for doubt as to whom they had chosen, his title should necessarily come under the cognizance of the courts of law. Had the House of Commons ordered the Sheriff of Middlesex to levy wages for Mr. Luttrell, Westminster Hall or the County Court would have had a voice in the settlement of the question.

Prior to the assumption of this privilege, when the right to the return was disputed between two rival candidates, it was disposed of by the ordinary Courts, and according to the ordinary forms of law—juries determining questions of fact, and judges questions of law³; and one

¹ Plea for the Lords, 413.

² See Prynne's Fourth Part of a Brief Register, Calendar, and Surveys, &c., on the writs *de Expensis Militum*, and 23 H. 6. c. 9.; 6 H. 8. c. 18.; and 34 & 35 H. 8. c. 13. and c. 24.

³ See Fourth Part of a Brief Reg., &c., 259., Glanv. Introd. xi.; Hale's

good result of the system then prevailing was that there were not "above two or three cases of elections questioned or complained of from the 49 Hen. III. till the 22 Ed. IV., for aught appears by the returns or Parliamentary rolls, and not so much as one double return or indenture."¹ There is no trace of the House of Commons having attempted to exercise this privilege, as now claimed, before the reign of James I., and Sir Francis Goodwin's case, though commonly quoted as an instance of its exercise or a precedent to justify its assumption, cannot when scrutinised be regarded as either one or the other. Throughout the discussion upon that case, they never once pretended to possess a right of determining controverted elections. The ground upon which they refused to confer with the Lords in the first instance was not that the Lords had no right to interfere upon such a subject, but that it was not consistent with the orders of their House to "give account of any of their proceedings," or to reverse an order once made (see Com. J. 156-7, &c., &c.). This was the technicality on which they rested throughout the controversy. They admit that there was not any such precedent before, and that the returns were then "decided by the positive laws of the realm." Moreover, in that case and the precedents cited by them in support of their views, the jurisdiction claimed was only over the irregular issuing and execution of writs, and examining the truth of the return, "as if a knight be returned dead, lunatic, absent," &c., &c. This was according to their resolutions an ancient privilege, and must, therefore, have been exercised at the periods when, by acts of Parliament, the determination of false and illegal returns was confided to the courts of common law, and was wholly different from the right subsequently claimed of deciding all questions respecting the franchise or its exercise. The power claimed in that case was only the power previously exercised by the Chancellor. But the Chancery was only the depository of the writs,

Jurisd. of Parl. 66-68.; 7 H. 4. c. 15.; 11 H. 4. c. 1.; 8 H. 6. c. 7.; 23 H. 6. c. 15.; *Plowd. Rep.* 118-131.; *Rast. Entr.* 410 a, pl. 1. (See an instance of the King and Lords interfering at the request of the Commons, *Cotton's Pract. Abr.* 391., R. P. 5 H. 4. n. 38.

¹ *Brev. Parl. Red.* 137.

whence they were to be referred by the Chancellor or the Triers of Petitions to the tribunals to whose jurisdiction they properly belonged.¹ Neither the Chancellor nor the Triers of Petitions had ever attempted to decide a disputed question of fact, without the intervention of a jury; as, for instance, what was the ancient right of voting in any particular borough, or whether A. B. was in such circumstances as to be entitled to the franchise. Such matters of fact were determinable only by juries on the sworn statements of lawful witnesses, and on a comparison of their relative credibility, and never till the assumption of this privilege had been disposed of in any other manner. If, therefore, the Commons had confined their pretensions to their ancient privileges, or to the jurisdiction exercised by the Chancellor, they could never have assumed the decision of a case in which the right of election was controverted on a question of law or a question of evidence. They, however, improving on the model of the King's Bench and the Exchequer, which founded respectively almost all their jurisdiction on the fictions of *Quare clausum* and *Quo minus*, were about that period proceeding to bring by a similar fiction of "breach of privilege," all manner of suits and causes, original and appellate, actions of debt, libel, slander, ejectment, bastardy accounts, and every offence from trespass to treason, within their jurisdiction²; and we must not therefore wonder at finding them declare in 1623-4, that it was "an ancient, natural, and undoubted privilege of the Commons in Parliament to examine the validity of elections and returns,"³ a few years later claiming exclusive jurisdiction on every question relating to the right of election, and in 1704 putting a climax to their pretensions by committing the Aylesbury men for suing a returning officer for an unquestionable wrong which could never come before them in any shape for redress. Of all their usurped jurisdictions, the present is, perhaps, the only one which the common sense of the community has not long since forced them to surrender totally, and even this, in consequence of the legislation of the last seventy years, no

¹ See Hale's Jurisd. of Parl. p. 66-68. &c.

² See Journals, passim, and Hargrave's Pref. to Hale's Jurisd. of Parl.

³ Glanville's Rep., Introd. p. 11.

longer survives in all its integrity as a means of enabling them to choose each other and each other's electors.

Were every other argument to be waived, the incompetence of the Commons to decide the merits of a controverted election, should be considered to follow necessarily from their inability to examine witnesses on oath, while by law no man's rights could be affected before any tribunal except on sworn testimony. The inconvenience of this was felt soon after the assumption of this jurisdiction, and a Committee was appointed to search for precedents, and if they could not find that the House was empowered to administer an oath, to bring in a bill for that purpose. Though it has never yet administered one, it has *voted* that it has power to do so, and declared that by its great authority it can compel witnesses to state the truth without the aid of such a sanction. No one can believe, even the House of Commons, that mankind in general will speak with the same scrupulous regard to truth, when not sworn, as when sworn. But what was its great power for extracting the truth? It could only commit those guilty of saying "the thing which is not" to prison till the end of the session; and if the false statements happened to be in support of the views of the majority, what could the false witnesses have to fear?¹ The ill effects of such a system will be particularly apparent, when it is considered that the Commons had to examine witnesses on the most difficult questions of evidence—those affecting ancient customs and usages, which are always the most perplexing from the conflicting nature of the testimony. What then can we think of their deciding such questions on the loose statements of men not bound by oaths or honour to speak the truth, but impelled by every motive which could influence humanity to maintain what they might think would be advantageous to the party by whom they were espoused or purchased either in the House or at the hustings.

Let us now briefly point out the mode in which the cases now tried by Committees might be disposed of by the ordinary tribunals. We may lay it down as a general rule, that as the law now stands, no question as to the property qualifica-

¹ See a prosecution prevented, C. J. 8 W. 3. 4th Dec.

tion of an English elector can come before a Committee ; for though the 6 & 7 Vict. c. 18. s. 98., allows a Committee to decide upon a man's right to vote where his name is placed on the register, or kept out of it by the express decision of the Revising Barrister, yet no Committee, we may presume, will entertain such question if the party neglect to appeal to the Common Pleas, whose decision is final. The only questions which can be put to an elector at the hustings are two, the first being as to identity, and the second as to whether he had voted before at that election ; and the only ground on which his vote can be impeached before a Committee is that he gave a false answer to either of these questions, or that he was bribed, or disqualified to vote by reason of holding some office under government, or being convicted of perjury, &c. Now it is plain that these are questions that vitally concern him, and that should not be decided in a back-room in London, perhaps 300 or 400 miles from his home, by way of episode, in a contest between two rich and noble aspirants to legislative honours, who may have never heard of him before, and may never wish to hear of him again, and who dispose of him and his character just as it suits their own purposes, without his being aware of the attack made upon his rights and reputation, or having an opportunity of defending himself by his own counsel, agents, and witnesses, and all this before men, too, who do not know him or the character of the witnesses for or against him, or even understand the law under which they are affecting to judge him. Such a system was perhaps defensible formerly on the ground of the supreme contempt in which the potwallopers of the realm were held by those who bought and sold them, and by those who sat in the Parliamentary court of piepowder to settle disputes between rival dealers, and who of course never thought of the rights of the things that were the subject of barter. But now that the Reform Act has raised electors to a higher rank in the social scale, common justice, as well as a regard for their rights, point to some mode of trial by which they would be called on, and would be at liberty to defend themselves. That mode is already partially provided ; giving a false answer to either of the questions put at the hustings,

or accepting a bribe, is a misdemeanour. The simple course, therefore, so far to pursue, is to provide that no petitioner shall be at liberty to object to a voter before a Committee of the House of Commons unless he has first obtained judgment in a court of law against him, and that that judgment shall be conclusive; and as to other grounds of disqualification, to provide simply that the matter, which is a cause of disqualification for voting, should be a disqualification for registering; and so have all such questions, like the others, affecting a voter's right to register his privilege, tried by a Revising Barrister and the Common Pleas. We can only suppose that it was by an oversight that such a provision was not inserted in the Reform Act, or the 6 & 7 Vic. c. 18. Were it to be carried into effect, all questions affecting voters personally would be tried before the ordinary courts, and in the manner best calculated to effect the ends of justice.

The questions respecting voters individually being thus disposed of, the only other questions that would remain affecting parties other than the candidates, would be questions of false returns. These are now very rare. They may be disposed of also by the several other statutes now in force; and by revising the 23 H. 6. c. 15., increasing the penalties in proportion to the advance in the value of money, and making the judgment of a court of law in an action against the sheriff conclusive on the House as to the right to the seat. In the above act of Henry 6., there was no provision that the seat should be delivered to the party duly elected, as in those times there was an election generally for each session. The only questions which would then remain for a Committee to decide, would be those affecting the candidate individually; that he had been guilty of bribery, or treating, or was not qualified. Severe penalties are provided by statute against parties guilty of bribery or treating. We can see no reason why it should not be compulsory on the petitioning party to proceed, first for those penalties in a court of law, and produce the judgment as conclusive on the House. Were this to be done, bribery and treating would not be as common as they now are; and parties, with a profusion of money, would not, as they now do, speculating on the chance of escaping by the favour or folly of a Committee, expose themselves to

certain defeat in their parliamentary pretensions; and, if not extremely wealthy, certain pecuniary ruin.

The only other questions which would remain to be decided, would be those respecting the candidate's qualifications. These are, above all others, the very questions which Committees are most incompetent to decide. How can *they* decide such questions? Few of our readers can have forgotten the Hull case in 1838. On the sufficiency of the qualification there the most eminent conveyancers of the day disagreed. We remember well the late Mr. Duval writing to the newspapers to vindicate his reputation for having given an opinion which did not prove to be on the winning side. We were ourselves present at the discussion of the knotty question in the Galway case, in 1838, whether a Master in Chancery was qualified to sit in parliament. The Committee heard, for two days, two learned counsel discuss the point in every possible view. We think they decided rightly; but the question was one which no court in the realm would dispose of after less than a week's consideration; but the Committee, on the close of the reply for the petitioner, cleared the room, and in fifteen minutes announced their decision.

Such cases are of frequent occurrence. Now, would it not be better for the House, in such cases, to adopt the course pursued by the Equity Courts, and to refer such questions to the proper tribunals; that is, when the question arises on a matter of fact, as in the recent Dartmouth case, whether a candidate is a government contractor, to direct an issue of fact; and when it arises on a matter of law, as whether a Master in Chancery is or is not qualified to sit, to direct an issue of law to one of the courts at Westminster. Mr. Luders, many years back, recommended that Committees should have the power to send written questions to some of the Judges on points of law, and that their answers should be conclusive.¹ But as the Judges are averse to giving extra-judicial opinions, and particularly until they have heard the arguments on both sides, we think the ordinary course pursued by the Equity Courts should be adhered to. We think, too, that if either party should be dissatisfied with the opinion of one court on

¹ Rep. Controv. Elect. Introd. p. 25.

an issue of law, he should be allowed to have it sent back to another court, first paying all the costs of the preceding hearing; and if the two courts differed, to carry it to the third, whose judgment should be final.

And here we would further observe, that whenever the candidate, returned by the majority of the electors, should be declared ineligible, we should not allow the person chosen by the minority to represent the majority, on the ground of any notice, actual or constructive, of their favourite's want of qualification, but should direct a new election; for we think it inconsistent with common justice, and the rights of electors, to bind them by notice of a technicality given in the heat of an election contest, the truth and effect of which they cannot determine, and which they may regard only as a joke or a trick.

The first objection that will be urged against the adoption of these propositions is that it would lead to delay in the decision of questions, affecting the component parts of the legislature, with regard to which delay should on no account be tolerated. We do not think it would lead to this result, and we think also that in a few years it would restore in a great measure the ancient paucity of disputed returns. But even if it should lead to delay would it not be better that the person chosen by the majority of the electors should represent them for a few months, than that a person elected by a Committee, in contravention of law and right, should represent them for years? But Committees have not been remarkable for speed in disposing of election cases. Under the Grenville Act the delay was so considerable that it sometimes happened that a man was declared duly elected just as parliament was about to be dissolved. It appears that of 182 petitions presented from 1774 to 1790, 68 were deferred over the first session, and 7 over the second session¹; and yet that act was considered a great improvement upon the preceding system. Again, in the last instance of a general election that occurred under the next statute, the 9 Geo. 4. c. 22., the elections took place in July and August, 1837, and the first day for hearing petitions was the 6th February, 1838, and the last the 22d of May. Again, in the only instance that occurred under the next act a somewhat similar

¹ See the Indexes to the Com. Journals for those years.

interval elapsed between the general election, which took place also in July and August, 1841, and the last day for trying petitions. In that interval almost every question of fact and law might have been decided if there were a provision that cases properly certified as affecting elections, should, on being set down for trial or argument, have precedence of all others, and in fact almost every controverted election might be decided before the time which the House of Commons now commonly fixes for the hearing of the first case. It might of course happen that some cases might present peculiar difficulties, and occupy the courts a considerable time. But so do some cases now. Few who take an interest in these matters, can forget the time occupied by the committees and the commissions in the Dublin and Westmeath cases. Moreover, if questions of great importance occur, it is only right that the Judges should be allowed to take some time to consider them. Hasty judgments are never desirable, and least of all on matters affecting the constitution of Parliament, *nec unquam in judiciis tantum eminet periculum quantum parit processus festinatus*, 3 Inst. 210. Though a trifling delay in the determination of one or two cases might be regarded as a serious matter, yet the effect of those decisions in all other similar cases is to be looked to. A Committee from its constitution and mode of deciding can never set a question of law at rest. The same questions have been debated and decided differently before different Committees over and over again, and will continue to be so debated and decided till time or the Committees be no more. But as the judgment of a court of law would be conclusive, the same point could never be debated a second time, or be the ground of subsequent petitions, and thus one great source of the present system of endless litigation would be swept away. And, moreover, as parties could not then petition, speculating on the ignorance or partiality of a Committee to overrule the established law, and it would be known and felt that every case would be fairly decided according to law, and the unsuccessful litigant would have to pay his adversary's costs, there can be little doubt that in a few years election petitions would be comparatively rare. We have time only to notice one other objection. It might be said

that Judges and juries might be warped by political bias as much as Committees. We do not think this would be so. The judgments of the courts on points of law would be general, and applicable to all cases of the same character, and therefore could not be susceptible of any party bias. Again, if a single Judge presiding at *Nisi Prius* were to lay down the law erroneously, his ruling could be corrected by the court above. So if a jury were to find against law and evidence, their verdict could be set aside and the matter submitted to a more "upright dozen." Again, as the several portions of the case on which it would be sought to set aside a return, might be tried in different courts and before different juries, and as, if a jury acted improperly on one issue, another jury might be impanelled to try the next (as for instance on charges of personation against different voters), each court and jury would (apart from all better motives) see that they might injure their own characters without serving their party, and would therefore look to the result of the issue only as it should affect the parties to the record personally.

If the system of general and select Committees were abolished, as it would be necessary that there should be some persons to attend to election petitions, we should recur as much as possible to the early practice of Parliament in appointing Triers of Petitions, and at the commencement of each session we would select from amongst the members three of the most eminent lawyers not connected with office, and make them a permanent Committee for receiving election petitions, directing issues, and disposing of those details, which, from the nature of the general plan which we have sketched out, must be still left to some court or body connected with the House of Commons. In early times it was not necessary that the judgments of the courts of law, showing who was duly elected, should be certified to Parliament, as for each session there was a new election, but now it is necessary that this should be done; and therefore, the persons on whom the duty of receiving these formal proofs should be devolved, ought to be men who were thoroughly versed in the law, and would have characters to lose by any exhibition of negligence or ignorance. We are not quite

sure that we should not, following the example of the House of Lords with regard to private bills, appoint a counsel to the Committee, who would examine into all matters of detail, and relieve the Committee from unnecessary drudgery. By this means, and by selecting only men of the highest qualifications on the Committee, and causing it to be regarded as a sort of stepping-stone to the bench, there could be no doubt that the duties would be well and efficiently discharged.

Few will dispute the very beneficial results which would follow from Parliament giving up the two sources of jurisdiction to which we have hitherto addressed ourselves — divorce and controverted elections — which belong so obviously and peculiarly to the administrative departments of justice, that they cannot possibly with any propriety fall within the functions of a legislative body. Did we not feel that we have already trespassed too long on the patience of our readers, we should proceed to develop our views with regard to the further reformation of the present practice of Parliament as to the passing of private bills generally, Estate Bills, Railway Bills, Canal and Gas Bills, Towns Improvement Bills, &c. &c., which, if not checked, will reach such a climax in a few years that every second place and person in the realm will be under the protection of some local and personal statute. We are glad therefore that the subject of private legislation has engaged the attention of a Select Committee in the present Session, and we look with interest on its proceedings.

ART. V. — THE FLIGHT OF THE TERMS.

IN the interval between the passing of the Act relating to Satisfied Terms, and the day on which it came into operation, that is to say, from the 8th of August, 1845, to the 31st day of December, 1845, many were the small voices lifted up against it. Mutterings and doubts, and misgivings, and questions, and anticipations, were heard on every side. What would the Judges do about it? What said the proctor? What said the Conveyancing Club? It was reported that an eminent member of that association had said in the most forcible

language that he would assign terms in spite of the Act; in fact, it was asserted that he had boldly declared to his own clerk, that he, the eminent conveyancer, would see either himself or Lord B. (for the story ran both ways) at the devil¹ — we cannot avoid using the word by any circumlocution — before he would attend to the Act. Then there was to be a conflict of Courts on the subject. The Courts Ecclesiastical were to hold one way, the Courts of Common Law another. The Courts Christian, it was said, were not to grant letters of administration to represent these terms, and unless so represented the Court of Common Law, it was also said, would not allow an ejectment to be brought on one of these moribund excrescences. It was true that there was no decision of this kind by any Judge, lay or ecclesiastical, but then on these occasions there is a marvellous facility of knowing how a Judge will decide when the case does come before him. As the eventful 1st of January, 1846, drew near, however, this bold talk grew a little more faint. What was to be done? Here was the Act! What did the Conveyancers Club say? was asked in a more doubtful manner. What said the eminent conveyancer who had used the forcible expression already alluded to? The evidence grew less satisfactory as to this. It was even said that the eminent conveyancer denied having used the expression at all. It was boldly asserted that he had altered his mind. The result seems to prove that this latter assertion was the more correct one. The 1st of January arrived, and more than six months have now elapsed, and we venture to state that, considering its extensive bearing on almost all dealings with land, and the difficulty of legislating on its subject matter, the act has been very successful. Its object has, we think, without any exception been admitted to be a good and proper one. And as to its effect, we are desirous of putting on record the opinion of Sir Edward Sugden, and we are sure that our readers will agree with us that higher testimony cannot be produced.

¹ This reminds us of another story. A learned Judge, previous to going Circuit, is said (alluding to certain alleged long-winded speeches of counsel on that Circuit) to have declared "that he would put a stop to them, or he'd know the reason why." "Well, then," said one of the gentlemen threatened, "he'll know the reason why!"

In the last edition of his work on "Vendors and Purchasers," Sir Edward thus speaks of the Act:—

"This Act puts an end to the assignment of satisfied terms as a protection to a purchaser, and there appears to be no foundation for the notion that any such term can now be kept on foot as an attendant term by assignment. The doctrine of presuming a surrender of a term can now only arise as to terms within the exception, and is not likely to arise even as to them."—p. 777.

This, coupled with the many other allusions to this act throughout this edition, is, we think, considering Sir Edward's judicial position, when he wrote it, equivalent to a decision in support of this act; and, were it necessary, would settle the practice of the profession as to it. We apprehend, however, that it was not necessary. The great body of the highly respectable branch of the profession, to whom it more particularly relates, at once resolved to act under it; and we apprehend that a taxing master would very soon set the matter right if any deed for this purpose were drawn, or any expenses incurred for the purpose of keeping one of these terms alive.

The saving by means of the Act, in dealings with land has been computed at 200,000*l.* a year¹, and this fact enables Lord Monteagle, in his Report (p. 40.), to refer triumphantly to the direct bearing of the recent reforms towards lessening the existing burdens on land.

Satisfied terms of years then are now at an end; they are sent to the limbo of absurdities, and the whole exploit of driving them out of existence suggests a new application of some stanzas of Ariosto, which we trust are not so familiar to all our readers that they will not endure their repetition.

¹ See Evid. on Comm. Burd. of Land, p. 444.

² "Two Acts which have recently passed, effecting a wise and salutary reform—the one dispensing with the assignment of terms, the other for abolishing the lease for a year,—are stated to have saved 250,000*l.* a year to parties interested in land. The alteration of the law respecting fines and recoveries must have also had a prodigious effect, and the committee rely with confidence that the greatest relief will be finally obtained for the owners of real property by a determined perseverance in sound legislation." The other of the Lords' Reports, which was adopted, also acknowledges the great benefits which have been derived from the Act.

They may remember the victory obtained by Astolpho over the harpies, and to what can these insatiable and useless phantoms be so accurately compared?

Oh ! fameliche, inique, e fiere arpie,
Ch' all' accetata Italia e d' error piena,
Per punir forse antique colpe vie
In ogni mensa alto giudicio mena !

Orl. Fur. Cant. 34. st. 1.

" Oh ! long and hungry *termors* that on blind
And erring *England* have so long time fed,
Whom for the scourge of ancient sins design'd,
Haply, just Heaven to every *title* sped."

See how accurately they are described :

Per lunga fame *attenuate e asciutte*,
Orribile a vider più che la morte,
L'alacce grandi avean diforme e brutte,
Le man rapacci, e l'ugne incurve e torte,
Grande et fetido il ventre, e *lunga coda*
Come de' serpe che s' aggira e snoda.

Cant. 33. st. 120.

" Emaciated¹ with hunger, *lean and dry*,
Fouler than death, the pinions they expand
Ragged and huge, and shapeless to the eye,
The talon crook'd, rapacious is the hand,
Fetid and large the paunch, in many a fold
Like snakes their long and knotted tails are roll'd."²

And next comes their destruction by the magic horn,
otherwise the act 8 & 9 *Vict. c. 112.*

Astolpho il corno subito ritrova,
Gli augelli che non han chiuse l' orecchio,
Udito il suon, non pon stare alla prova
Ma vanno in fuga pieni di paura,
Ne di cibo ne d' altro hanno più cura.

" Astolpho quickly lifts the bugle's round,
And (for unguarded ~~are~~ their harass'd ears)
The harpies are not proof against the sound.
In terror from the royal dome they speed,
Nor meat, nor aught beside the monsters heed."

¹ We have availed ourselves of Mr. Stewart Rose's elegant translation, as our own Muse has long since fallen asleep.

² Whoever has traced a term through an abstract will feel the force of this.

Subito il paladin dietro lor sprona,
 Volando esce il destrier fuor della loggia,
 E col castel la gran città abbandona,
 E per l' aria cacciando i mostri poggia,
Astolpho il corno tutta volta suona,
Fuggon l' arpie verso la zona roggia.

" After them spurs in haste the valiant peer,
 And on the winged courser forth is flown,
 Leaving beneath him in his swift career
 The royal castle and the crowded town,
 The bugle ever pealing far and near,
 The harpies fly towards the torrid zone."

Quivì s' è quella turba predatrice,
 Come in sicuro albergo ricondelta,
 E giù sin di Cocito in sulla proda
 Scesa e più là dove quel suon non oda.

" Hither the predatory troop retreat,
 As a safe refuge from the deafening yell,
 As far and farther than Cocytus' shore
 Descending, till that horn is heard no more."

Il paladin col suono orribil venne,
 Le brutte arpie cacciando in fuga e in rotta,
 Tanto che a pie d' un monte si ritenne,
 Ove esse erano entrate in una grotta.

Cant. 34. st. 4.

" Hunting these hideous birds that cavalier
 Aye scar'd them with the bugle's horrid sound,
 Till at the mountain cave his long career
He closed, and ran the monstrous troop to ground."

And now, doubtless, if other acts shall pass, we shall have similar difficulties to overcome. Predictions as true, and opposition as powerful will again be brought into the field. The eminent conveyancer will no doubt again make use of the same forcible language to his clerk; but we have perfect confidence in the general good sense and proper feeling of the profession. When once the lawyer finds a clear expression of intention on the part of the legislature, it is his duty to assist it, and not to attempt an opposition which cannot be creditable, and which must, in the end, be unsuccessful; and this we believe to be the general opinion of the profession.

**ART. VI. — WRITERS ON THE CONFLICT OF LAWS,
OR PRIVATE INTERNATIONAL LAW.**

THE term, "International," now current in France and Germany, as well as England, is correctly remarked by M. Ortolan, Professeur à la Faculté de Droit de Paris, to be of British origin. And there can be no doubt it was introduced by Mr. Bentham, without being aware that the same view of *Jus inter Gentes*, or of *Jus Gentium inter Civitates*, had been previously taken by Chancellor D'Aguesseau; and, by the latter, apparently also without being aware a similar view had been previously taken, during the 17th century, by Dr. Richard Zouch (*Zoucheius*) of Oxford, afterwards Judge of the High Court of Admiralty of England. To the adoption of this new "Term," Mr. Bentham appears to have been led, in the exercise of that acute discrimination of ideas and words, for which the science of law is so much indebted to him, in order to put an end to the confusion which had arisen and long prevailed from the same term, the Law of Nations, or *Jus Gentium*, having been applied by different authors at different times, and by the same authors in different places, to denote branches or departments of law very different from each other. And while it is to be regretted Mr. Bentham did not push his analysis and discriminative phraseology farther and deeper into the details and component parts of International Law, the introduction of this new term has certainly been of great use, in marking distinctly that department of law, which is composed of and unfolds the reciprocal rights and obligations of nations or independent states towards each other in their mutual intercourse. It has put an end to the risk of its being confounded with the *Jus Gentium* of the Romans, which seems to have designated that branch of the internal law of a state, which is not peculiar to it, like the *Jus Civile*, but which it enforces and observes in common with other civilized nations. And it

clearly distinguishes the external juridical relations of nations in their intercourse with each other, from those branches of the internal jurisprudence of independent states, such as the Law of Maritime Commerce, of which the rules or component parts are similar or analogous, and common to a number of civilized nations; and which, in modern times, had come to be frequently designated and called by the vague appellation of *Jus Gentium*, although they did not involve international rights or questions between nation and nation, collectively or individually.

Besides the significations just mentioned, — the one definite and precise — the other loose and indefinite, there has also come to be in practice a third signification of the *Jus Gentium*, as involving those laws, or questions, or doctrines, which arise from a *conflictus legum*, or collision of laws. But it does not appear that this department of law can correctly be denominated International, unless it involves the reciprocal rights and obligations of different nations towards each other, either in their collective or individual capacities and intercourse; and it rather appears the various writers who have treated separately of the Conflict of Laws generally, as a whole, such as Rodenburg, Voet, Hertius, and Boullenois, have not traced its ultimate principles to the international juridical relations of independent states. A conflict or collision of laws, juridically affecting the interests of individuals, does not necessarily imply that these individuals belong to different communities or states, foreign to each other. It may arise among individuals of the same nation or state, if they have changed their place of residence from one country to another, or enter into contracts or mutual transactions, or execute unilateral deeds in one country, which are to be carried into effect in another, where a different law prevails. Without distinguishing that the *conflictus legum* may have either of these two sources, and observing the difficulty of solving such questions agreeably to the principles of international law solely, in consistency with the fundamental principle of that law, — the independent sovereignty of each nation, the older writers on the *Conflictus Legum*, such as those before alluded

to, have unhappily sought to find principles for the solution of such questions in what they have termed the *Personalité*, the *Réalité*, and the mixed nature of laws in these respects. On the other hand, the later writers in this department of Jurisprudence seem to have erred, inasmuch as they give the appellation of International Law to a class of cases and rules which do not presuppose any question, much less any conflict or collision, between the laws of different nations; but may, and do, occur in one and the same nation. In the latter case, the laws or judicial determinations arising out of the *conflictus legum* are a part, not of international law, but of the municipal law, or internal jurisprudence of each sovereign independent state.

Having thus distinguished international law, properly so called, from the other departments of law, which were formerly very frequently and generally designated by the terms *Jus Gentium*, or law of nations, we have next to inquire how the term, "Private," has recently come to be applied to international law. In the interior of civil societies, or communities, or independent states, one portion of the law determines the powers and duties of the Government towards, or in relation to, the governed, or subjects generally, and is called "Public," or "Constitutional:" another portion determines the rights and obligations of the individual subjects, in relation to each other, not to the state or government, and is called "Private." In the same way, among independent states, their intercourse may either be in their collective or public capacity, or between or among the private individuals of whom the nation is composed. When the nation acts, as in negotiations, in the conclusion of treaties, or in entering into war, it must, of course, do so, in its national, collective, and public capacity, through its Government. And when a nation is reduced to the necessity of using physical force in defence or in vindication of its just rights, the nation or Government goes to war, not private individuals. But war is the extraordinary and unnatural state of nations; peace their ordinary and natural state. During the violent and compulsory state of war, undertaken for the purpose of enforcing international law, when infringed, the rights and

obligations of the individuals composing the belligerent nations in relation to each other, are annihilated or suspended. Intercourse ceases between the inhabitants of the belligerent countries. During peace, the rights and obligations of the inhabitants of countries, living under separate and independent Governments, in their mutual intercourse, are either voluntarily observed, without any compulsion, or are enforced, "modo civili," under express conventions or reciprocal declarations, or under long-established international usage, by, the tribunals of one country, with reference to the subjects of another government. And this last department, it appears, may be properly enough called "private international law," as distinguished from the "jus publicum belli," and the other public international law, which regulates the conduct of governments in negotiating by public ministers, and in concluding treaties; and as including the *Conflictus Legum* among individuals, so far as it arises between the inhabitants of different independent states; reserving the other cases of the *Conflictus Legum* among the subjects of the same government, to be determined by the internal, or municipal law of each sovereign state.

It being thus apparent that there are valid grounds, both in fact and law, for the distinction of law into international, as well as national, and of international into private and public, it is strange that the series of Continental writers on the *Conflictus Legum*, during the seventeenth and eighteenth centuries, jurists, not only learned, but acute and ingenious, should have considered the doctrines of the *Conflictus Legum*, as a separate department of law, forming a whole of itself, without regard to the different sources from which the conflict may arise, or to the different legal principles which may consequently become applicable. And it may be worth while to inquire what may have been the causes of this rather singular mode of proceeding.

If the laws of all nations were identical, there would, of course, be no occasion for the courts of justice of one nation enforcing the law of other nations; or, at least, in enforcing the law of other countries, the tribunals of the one country would be merely enforcing their own laws. But experience

proves, that the laws and usages of different nations, tribes, and states, differ in many important particulars. And the differences in these laws and customs, it is plain, arise from the physical differences in the mental and corporeal constitution of the different races of mankind; from the mode in which the species is propagated, and the varieties in the succession of individuals, of whom, from generation to generation, the community is successively composed; from the differences in the external circumstances, in point of climate and produce, in which these various races of men and individuals are placed, as separated and scattered, in independent communities, over the surface of this earth; and from the different degrees of advancement they have made in the cultivation of the arts of life, and in what is called civilization.

Farther, these differences in laws and usages appear, historically, to have been increased, for a time, in modern Europe, by the manner in which the Western Roman Empire was invaded, overrun, and finally occupied, as settlers, by the comparatively barbarous population of the northern and eastern regions. That population consisted of a great number of separate and independent tribes, forming distinct communities, having each a government of one kind or another within itself. Among these we find the Visigoths, the Ostrogoths, the Vandals, the Huns, the Franks, the Alemanni or Germans, the Longobards, the Burgundians, the Saxons and Anglo-Saxons. And these different tribes, when they finally settled, appear to have occupied separate portions of country as their territories, and to have continued or formed distinct states or governments. Thus Spain continued for ages to be divided into, and to be occupied by several independent kingdoms and states. France was divided into several large independent provinces on the north and on the south, the latter observing the written, the former, the customary or unwritten law; and Germany, under the nominal Roman Emperor, was divided into a number of separate kingdoms, electorates, dukedoms, and smaller states possessed of sovereign power. Even the British Isle, not to mention the Heptarchy, and Wales,

was divided between two separate nations and independent governments.

In the progress of time, however, from various causes, such as the marriage alliances of sovereign families, and the succession of princes to the kingdoms or territories of their deceased relatives, and the ambition of sovereigns and republics terminating in conquest, the great number of the originally small kingdoms, principalities or provinces, came to be united into the larger kingdoms and states into which modern Europe has been divided, and is now occupied. At the same time, although a number of small kingdoms, principalities and provinces, came thus, from the operation of such causes, to be united and combined into greater wholes, under one head and central government, the local long-established habits and usages of the populations of these different provinces did not thereby undergo a corresponding union, amalgamation and identification, or even assimilation, either immediately, or for a series of ages. In France, in particular, the difference between the laws, usages, and customs of the southern and of the northern provinces was great, and seems to have continued till after the Revolution, in some manner, if not even till now, as may be seen from the learned labour of Merlin and Toullier. Nay, when the inhabitants of the narrow district of Holland liberated themselves from the oppressive government of the Austrian and Spanish monarchs, there were differences in the local laws and usages of the small municipal states or provinces, of which the Union came to be composed.

In these peculiar circumstances, there arose various and more frequent collisions of laws, *conflictus* or *collisiones legum*, which early attracted the attention of the commentators on the Roman civil law, such as Bartolus and Baldus; and afterwards exercised the ingenuity of the writers on the local usages and particular laws, not only of the larger separate independent kingdoms or states into which the European Continent came to be divided, but also of the provinces or districts which came to be united in the formation of these larger states.

Early in the 15th century (1529), Molinæus, or Charles du

Moulin, published "*Commentarii in Consuetudines Parisenses*," afterwards published at Paris in 1625, under the title, "*Les Coutumes Générales et Particulières de la France et des Gaules*," with annotations, augmented by Michel in 1635. Towards the close of the 16th century, Argentæus (President D'Argentré), published his Commentaries "*Sur les Coutumes Générales du Pays, et du Duché de Bretagne*," republished in 1674.

In 1624, Burgundus published at Antwerp his "*Commentarius ad Consuetudines Flandriae*," republished at Brussels in 1635, where the author treats of Personal, Real, and Mixed Statutes.

In Holland, in 1635, there was published the very distinct brief preliminary treatise by Rodenburg, "*De Jure, quod oritur, ex Statutorum vel Consuetudinum discrepantium Conflictu*." And in Germany in 1700 and 1716, Hertius wrote and published his acute "*Dissertatio de Collisione Legum*."

In Holland, from the middle and towards the close of the 17th century, Paul Voet, in 1661, published his treatise, "*De Statutis, eorumque Concursu*:" and John Voet treats the same subject, in his large work, entitled "*Commentarius ad Pandectas*," under the title, "*De Legibus*."

In Holland, there were published towards the end of the 17th century, and again in Germany in 1735, by Thomasius, the "*Prælectiones Juris Civilis*," of Ulric Huber, containing a brief but distinct dissertation, "*De Legibus, et de Conflictu Legum diversarum in diversis Imperiis*."

In France, again, from the commencement to about the middle of the 18th century, there were published (1742), "*Les Coutumes de Bourgogne avec les Observations du Président Bouhier*," and the "*Mémoires concernant la Nature et la Qualité des Statuts*, par L. Froland." Finally, in 1766, appeared the great work of Boullenois, in 2 vols. 4to., entitled "*Traité de la Personnalité et de la Réalité des Loix, Coutumes et Statuts*"—the most complete and best of all the French treatises on the subject.

From this notice of works, it appears, the department of law, we are now contemplating, was abundantly cultivated

by the different jurists of the continental nations. And these works certainly exhibit great ingenuity and acumen, and present a fair opportunity for the exercise of the practical discrimination of the student of law.

In England, on the other hand, as observed by Mr. Justice Story and Mr. Burge, little attention was for a long time paid to this branch of jurisprudence, partly, perhaps, from the Anglo-Saxon and Norman kingdom embracing the whole southern part of the island, and extending its laws over the smaller divisions into counties and hundreds, without being divided, like France or Spain, into large separate and independent kingdoms or provinces, partly from the English having carried their own national laws into Wales and Ireland. Indeed but little attention generally appears to have been paid by the lawyers of England to the laws of foreign nations, or to the conflict of the laws of independent states till the 18th century; apparently considering, and in many respects, though not in all, justly considering, their own system, as superior to that of other nations.

In Scotland, a little earlier attention seems to have been given to this department of law, than Mr. Burge, in his late truly *Magnum Opus*, supposes. The reported decisions in this branch of the Scotch law go back to the commencement of the 17th century. Although the majority of the Scotch Judges continued till the latter part of the 18th century, to hold the succession *ab Intestato* to moveable property to be regulated by their situation at the death of the proprietor, yet this is a point not without difficulty; and this judgment was corrected by the Scotch court, in the case of Bruce, 25th June, 1785, of course before the latter judgment was affirmed by Lord Chancellor Thurlow, in 1790, in a formal speech upon the ground of the succession in moveables being regulated solely by the *Lex Domicilii*. Although not familiarly acquainted with the treatises of Dumoulin, and D'Argentré, Rodenburg, and Boullenois, the Scotch lawyers, in prosecuting their study of the Roman civil law, could not fail to know something of the works of Voet, Huber, and Hertius, which have stood in their library for upwards of a century and a half.

When, in consequence of political events, religious intolerance, and other causes, a considerable portion of the population of England chose to emigrate and to settle on the eastern coasts of North America, they carried with them the laws of England. And it is a singular phenomenon, that in the United States of America the English common law should still retain its supreme authority in matters of private individual right. The emigrants and their descendants naturally formed themselves into small provinces, or states. And even while they remained under the British government, a number of varieties in the usages of these states must have grown up in the course of about two centuries. After the United States acquired their independence of Great Britain, the public law, the constitutional government, of course underwent a great change. But, as the states of the confederacy continued to retain their internal independence and sovereignty, the peculiar local usages and rules of the common law of each state, so far as they differed from the law of England, remained entire. In this way, the American United States came to be placed in a situation, somewhat similar to that of the European Continental States, before an uniform law in matters of private right was extended over the whole territory of each sovereign state, and central government. From this diversity in laws and customs in the several states of the American Union, questions became frequent and various. And, observing how little had been done in England in this department of law, the late Mr. Justice Story, in order to supply this want, resorted to the writings of the Continental lawyers before mentioned; and, in 1834, produced his excellent "*Commentaries on the Conflict of Laws.*"

The temporary peace of Amiens, and still more the successful and glorious termination in 1815, of the war for the maintenance of European national independence, left Great Britain in possession of several of her maritime conquests, islands, or districts upon the sea-coasts, which had been originally colonised, or subsequently acquired and possessed for long periods by other European nations. At the time these conquests were made, the internal private laws and usages of

the inhabitants were usually reserved to them entire; and to enable them to discharge their professional duties in the possessions thus acquired, as judges, barristers, or advocates, a certain portion of British lawyers were required to make themselves acquainted with the laws of Spain, France, and Holland. In this way, also, the occurrence of cases in which there was a *conflictus legum*, became more frequent. And from his long colonial experience and observation of the events here alluded to, and their consequences, Mr. Burge appears to have been led to devote his attention to this subject; and possessing, at the same time, access to all the information to be derived from state documents, produced in 1838 his "*Commentaries on Colonial and Foreign Laws*," in 4 vols. royal 8vo.; a most valuable work, and most interesting and useful to all persons concerned in, or connected with, the colonial dependencies of Britain.

We have already seen, that from the operation of particular causes, chiefly in France, Holland, and Germany, during the sixteenth, seventeenth, and eighteenth centuries, till towards the close of last century, the legal doctrines involved, or supposed to be involved, in cases arising from the *conflictus legum*, underwent an earlier discussion, than might otherwise have been expected. And the works left by the authors who wrote on this subject during these ages, exhibit great ingenuity and acuteness. But the correctness and soundness of these views are more questionable.

This is noticed, first, by Mr. Justice Story, and afterwards by Mr. Burge; and the contradictions among these different writers are distinctly pointed out. But both these writers seem to have thought it unnecessary to discuss minutely the foundation of the mode of investigation adopted by the Continental jurists. And without entering on such a wide field of controversy, Mr. Justice Story, in particular, appears to have aimed at the attainment of the object in view, by classifying the cases or questions, which it was held the province of these laws, as being personal or real, or mixed, to decide; and to adopt, for that purpose, principles from other sources, chiefly those which had been recognised by judicial determinations in different countries. But, after remarking the

unsatisfactory nature of the reasonings of the Continental writers, it would, perhaps, have been as well, had both of these late writers rested their doctrines less upon the works of these Continental jurists, as valid authorities, and not selected definitions and principles from these works.

In 1841, Dr. Schæffner published at Frankfort-on-the-Main a work entitled “*Entwicklung des Internationalen Privatrechts*,” Development of Private International Law, in which he differs from Mr. Justice Story, so far as the latter founds, at all, upon the Continental authorities of the seventeenth and eighteenth centuries. But this objection is only partially applicable; for Mr. Justice Story does not found solely upon the works of these jurists as authorities; and points out other and better founded principles for the solution of the questions arising from the *Conflictus Legum*. Dr. Schæffner, however, states another objection to the doctrine of Mr. Justice Story, for which there is, perhaps, more foundation, and which we shall afterwards consider; — that the *Comitas Gentium*, or *Convenance réciproque*, is too general and vague a notion, to be the foundation of a perfect right, or of compulsory law; and that accordingly jurists and courts of justice have rarely taken it as the basis of their decisions. We now come to the very learned work of Dr. Fœlix, published at Paris in 1843, entitled “*Traité du Droit International Privé, ou du Conflit des Loix de différentes Nations en Matière de Droit Privé*,” in 8vo. 1843. In this work Dr. Fœlix, who, we are informed, is a German by birth, and now a distinguished advocate à la Cour Royal de Paris, considers chiefly, if not solely, the *Conflictus Legum* arising from differences in the laws of different nations, which alone are international questions, distinguishing this department of international law from the questions and doctrine of the *Conflictus Legum* arising between subjects of the same state, which are, of course, entirely regulated by the internal jurisprudence, commonly, though inaccurately, called the Municipal Law of a country. And this treatise is, indeed, a superior production, not only as a work of scientific arrangement, simple, yet profound, but also a work valuable in practice, as exhibiting in detail the mode in which

the questions arising from the *Conflictus Legum* between the inhabitants of different countries are decided by the Codes, statutes, ordinances, and judicial determinations of these countries. With all its merits, however, we are still inclined to think that, in this treatise, Dr. Fœlix rests too much on the Continental writers on the *Conflictus Legum* of the seventeenth and eighteenth centuries as valid authorities, or as conducting, in consistency with sound legal principle, by accurate induction, to satisfactory results. At the same time it was natural enough for Dr. Fœlix, as a French lawyer, to be influenced by such great French authorities before him, as Merlin in his "*Repertoire*" and "*Questions de Droit*," and as Toullier and Duvergier in their "*Droit Civil François suivant l'Ordre du Code*," in still referring to the works of those jurists of the seventeenth and eighteenth centuries as authorities for the adoption of the *Personalité et Réalité des Loix*, as affording or capable of affording a satisfactory solution of the questions emerging from the *Conflictus Legum*. And it is not easy for the lawyers of a foreign country to form a correct opinion, of the conduct of the lawyers of another country in treating such a matter. Nevertheless, having never been convinced by the mode of reasoning adopted by the Continental jurists of the seventeenth and eighteenth centuries, who wrote on the *Conflictus Legum*, we were pleased to find its erroneous nature exposed in that country, in which it seems to have had its origin, by an acute and profound, though not, perhaps, an equally luminous writer — M. Mailher de Chassat, ancien magistrat, et avocat à la Cour Royale de Paris, in his "*Traité des Statuts*," published at Paris in 1843.

Long after it was united under one King, France continued to be divided into a number of provinces and cities, each of which had a kind of subordinate sovereignty, a sort of supreme local or territorial jurisdiction, apparently independent of the legislative power of the kingdom, in the administration of the common consuetudinary law. The crown, from time to time, caused to be prepared, and issued, ordinances possessing legislative authority. But these ordinances related chiefly to affairs of state, such as finance, taxation, &c., or were confined to particular branches of the

jurisprudence of the country, such as the *Ordonnance du Commerce* of 1673, and the *Ordonnance de la Marine* of 1681. But the ancient usages of the provinces and larger cities, which, though united under one great head, were as yet not half amalgamated into one nation, were left almost entire, to regulate the greatest part of the private rights of individuals. In these numerous coutumes of provinces and cities, such as the coutumes de Bretagne, de Picardie, de Normandie, de Bourgogne, de Lorraine, d'Orléans, de Paris, de Chartres, de Marseilles, d'Anjou, de Bourdeaux, de la Rochelle, de Toulouse, de Tours, de Troyes, the differences were great and frequent. And, puzzled with the *Conflictus*, or *Collisio Legum*, thence arising, many of the most eminent lawyers of France, during the seventeenth and eighteenth centuries, appear, with the best intentions, to have endeavoured to reconcile, or, at least, to discover, valid legal principles upon which the coutume of one province or city should be held to prevail over that of another. These principles they seem to have thought, they could find, in the nature of the laws and usages themselves. They accordingly divided laws into personal, real, and mixed; which last were held to be in some respects personal, in other respects real; with the view of determining which local law or usage should give place, and which should prevail. Nor does it appear the magistrates, or judges, and lawyers, of the provincial courts of France, were to blame, but, rather, that they deserved praise, for thus endeavouring to supply the defect in the intimacy of the union, by which the different provinces and cities of France had been combined into one kingdom, and to establish, individually, greater uniformity in the administration of the common or consuetudinary law throughout the country. The laudable example, too, thus set by the lawyers of France, appears, from the works before mentioned, to have been followed by the lawyers of the United Provinces and Germany.

But, although their object was laudable, the Continental jurists in this department do not appear to have adopted the proper mode for attaining that object. They do not appear to have got upon the road, which was to lead to the discovery of the truth. Indeed, it seems questionable whether person-

ality or reality can be, logically, or consistently with correct legal principle, predicated of laws. As applicable to mankind, laws are the rules by which the conduct of men, either in their private capacity as individuals, or in their political capacity as nations or independent states, is, or ought to be, regulated and determined in their mutual intercourse with each other. There are no human laws relating solely and exclusively to things, or external material objects, moveable or immoveable, unconnected with persons. Agreeably to the doctrine of the Roman lawyers, rights are correctly enough divided into personal and real. By the former are understood, beside the right to the safety, integrity, and security of the person holding the right, certain particular powers of control over the persons, or, at least, over the actions, of other particular persons, *adversus singulos*, whether with reference to external things or material objects, viz. *jus ad rem*, as in the important contracts of sale or lease, or with reference to other persons, or the incorporeal attributes of persons, such as the domestic relations of family and kindred, the social status of the individual, or his character or reputation in civil society. By the latter are understood certain particular powers of control, use, enjoyment, transference, and disposal, *adversus omnes*, over external things or material objects moveable or immoveable, to the exclusion of all other persons, viz. *jus in re*, such as the real rights of property, hypothec, lien, pledge, and prædial servitude. But independently of the incompleteness, if not absurdity, of a division of laws into personal and real, when there must be admitted a third head of the division, viz. mixed, as to which it is impracticable to decide whether they are either personal or real, except inasmuch as the one quality or the other may seem to predominate or preponderate, it does not appear how any thing could reasonably be expected to be found in the quality of laws as being personal, or real, or partly both, which could give to them any preferable station, any power, authority, or validity, the one over the other, beyond the territory and community, in or for which they had been enacted or had grown up, such as to have a controlling and binding force in another and foreign state.

In the internal government of a country, united under one

great head, but divided into provinces or smaller states, in other respects independent, such as France was during the sixteenth, seventeenth, and earlier part of the eighteenth century, or such as the United States of North America now are, effect might, or may, perhaps, be given to such distinctive qualities in law, through the direct or indirect instrumentality and exercise of the sovereign power, either in the shape of a representative central legislative assembly, or in the shape of a supreme court of law. But in questions, arising out of a *Conflictus Legum* between the citizens or subjects of separate and independent states, we could never see, how the *personalité* or *réalité* of laws could afford any rational ground for maintaining, that the law of the one country ought to prevail over the law of the other independent state. And, although his language be strong, we concur with M. Mailher de Chassat in the following conclusion, to which he comes at the close of the second chapter of the preliminary title of his first book: — “It was, then, as ridiculous (*derisoire*) as absurd, to undertake to resolve the questions which arise from the conflict of statutes or laws, that is to say, of the power of the respective authority of each of them, by the mixture of the matters which they had for their object. It was to attempt to measure the power of the law by the very object to which it is applicable, to limit the moral authority, which constitutes all its force, by the matter upon which it is exercised. Reason loudly condemned such an attempt; for the law, having gone astray amidst discussions as empty as subtle, abandoned the great interests, which it was charged to govern and to regulate according to general views of the public welfare, to the cavils or sophistical arguments of the understanding, to individual caprice, and then to formidable abuses.”

On the other hand, we cannot altogether agree with M. Mailher de Chassat, in ascribing entirely to the French Revolution the origin of more sound views in the department of law, which is embraced by the *Conflictus Legum*, or in the terms which he substitutes for *personalité et réalité*, viz. *nationalité et souveraineté*. We are well aware, that one of the beneficial consequences of the French Revolution to France itself, was the more complete union of the different

provinces, and the amalgamation of her population under a strong sovereign power. We are also aware that, in the latter part of the last, and at the commencement of the present century, there arose in France a succession of able and excellent lawyers, who perceived the advantage, and had the industry and talents to digest a set of codes, establishing one uniform system of internal jurisprudence throughout the whole country. And while we are called upon so frequently to express our disapprobation of the conduct of Napoleon, in the abuse of his great talents, of his military successes, and of his consequent power, we willingly make an exception on this occasion, and cheerfully admit that in this department, his ambition and energy, guided by Portalis, took the right direction, and hastened the accomplishment of the event, which had been previously contemplated, so as to give him a claim to the eulogy pronounced by the eloquent historian of the Decline and Fall of the Roman Empire on the Emperor Justinian:—"The vain titles of the victories of Justinian are crumbled into dust; but the name of the Legislator is inscribed on a fair and everlasting monument."

But while the establishment throughout the country of a uniform system of national jurisprudence conferred such great benefits on the population of France, other countries, kingdoms, and states in Europe had not suffered so much from being composed of separate provinces, differing in their laws and customs, and possessing a sort of independent jurisdiction; and, consequently, such kingdoms and states neither required, nor could benefit by, such a change in their internal jurisprudence, as that which was effected in France, some years after the Revolution, though perhaps not altogether completed at this day. And even in France, this internal amalgamation and combination of laws and usages into one uniform system, merely tended to diminish the number and frequency of the cases in which a *conflictus legum* took place. It did not reduce the number, or simplify the nature of the questions, which are properly international, or arise between the individual citizens or subjects of separate independent states. And accordingly, Mr. Justice Story and Mr. Burge, when they do not rely upon the authority of the continental writers on the *conflictus legum*, from Dumoulin

and Rodenburg to Hertius Huber, and Boullenois, seem chiefly to direct their attention to the ascertainment of the cases in which an international *conflictus legum* may, or usually does, take place, and to the application of otherwise generally recognised legal principles to the solution of these questions.

For the *personalité* and *réalité* of laws, M. Mailher de Chassat substitutes, in his late Treatise, *nationalité* et *souveraineté*; and, doubtless, nationality and sovereignty are the two great elements of international law. But, in endeavouring to solve the questions arising from the *conflictus legum* between the citizens or subjects of different independent states, it seems better, as in the common law or internal private jurisprudence of a nation, as well as in the law of nations in their intercourse as such, or in their corporate capacity, to consider the constitution of the human frame generally, mental and corporeal, the circumstances in which mankind are placed on this earth, and the events which take place around them. The following are, obviously, the more important: the mode in which the species is perpetuated, and the thence resulting relations of family, kindred, and succession; the birth-place and the place of residence of the individual, and his locomotion by land or sea; the division of mankind, from difference of race, seas, mountains, and other causes, into separate tribes or nations, each occupying a particular territory or domain, with an exclusive jurisdiction over things immoveable, and each constituting a separate independent sovereign state; the internal arrangements of these states, for their government, the legislative, the judicial, and the executive and administrative powers, the public constitutional law of the state, and the private jurisprudence of the nation; the external intercourse of nations with each other; the differences in the temperature of climates; the differences in the produce of different countries, natural or indigenous, or industrial; the differences in the description and advancement of the industry of different nations; the consequent exchange of commodities, or commerce.

Under these various circumstances and conditions or events, there are perceived to arise various juridical relations, justi-

fying and requiring the application and use of physical force, — views and feelings of justice, reciprocity, and general expediency. These juridical relations, as formerly observed, have been classed by jurists under a few heads, or maxims, such as “*neminem lædere, suum cuique tribuere, pacta servare, prædata aut abrepta restituere, damna resarcire, non alteri facere quod non tibi fieri velis, non ab aliis tibi postulare aut posuere quod non aliis tribuis* ;” and in reviewing in succession these circumstances and conditions, or events, or combinations of facts, in the intercourse of the individuals of different nations, in which a “*conflictus legum*” usually occurs, and in applying to that collision the legal principles just referred to, we apprehend we shall arrive at a more sound and satisfactory solution of the questions, either as a part of the municipal or internal jurisprudence of each particular state, or as a part of private international law, such as has been, or ought to be, recognised by the usage and practice of civilised sovereign states. -

These views we shall endeavour to follow out in another article ; inquiring, at the same time, whether Private International Law rests entirely on the “*comitas gentium*,” or “*convenance reciproque*,” according to the system of Dr. Fœlix ; or whether it does not rest on a higher principle, which in certain cases justifies the use of physical force, independently of human legislation, or of positive law, constituted by express convention or long established usage.

ART. VII.—GENERAL REGISTRY.

Society for Promoting the Amendment of the Law.

COMMITTEE ON THE LAW OF PROPERTY.

THE following reference was made to this Committee, —

“ To consider the propriety of establishing a General Register of Deeds and Instruments affecting Real Property.”

THE FIRST REPORT.

The question of the propriety of establishing a general register of instruments affecting real property is, perhaps, the most important one which, at the present stage in the course of Law Reform, could have been referred to this Committee. The subject derives this peculiar importance, independently of the great benefits which are expected to result directly from the measure itself, from the consideration that there are several extensive heads of Chancery law standing in great need of some improvement, (such as the doctrine of Notice, the rules as to the Priorities of Incumbrancers, and, in short, the whole system of Trusts and Equitable Interests,) for which no sound principle of amendment can be fixed upon until the question of registration or no registration is settled.

The general policy of a register in the abstract has fortunately been for many years the subject of frequent and able discussion both in professional circles and before the public. Nearly every argument and fact of any importance, and much of valuable authority and opinion will be found in the elaborate Second Report of the Real Property Commissioners and its voluminous appendix of evidence, and in the Report from the Select Committee of the House of Commons on a General Register, appointed in 1832; so that a very brief

allusion to the principal benefits and evils which have been supposed to be necessarily incident to the general scheme of a register will be sufficient in this place. The principle and details of the plan which may be thought best fitted for adoption, having regard to the existing laws and habits of this country, will require more particular attention.

The evils which a General Register is expected to remedy are, firstly, the frauds and losses to which purchasers, mortgagees, and others, are actually exposed under the existing system, and from which no amount of precaution can effectually protect them; and, secondly, the great delay and expense which are necessarily incurred on the occasion of almost every transaction affecting real property for the purpose of approximating to that security which, it is alleged, would be attainable with absolute certainty, and at a comparatively small expense, under a good system of registration.

It has been asserted by many opponents of the plan that, in fact, whatever may be the intricacy or expense of the present system, it does substantially afford all the security that can be desired to persons using ordinary care and diligence, and that very few cases of actual fraud, or of fabricated titles, occur in practice. Now, though it may be true that colourable titles are seldom got up with success by persons having no connection, or pretence of connection, with the estates in question, it is certainly not true that frauds are not frequently committed by persons who have, or have had some estate or interest in the lands they profess to dispose of, but who succeed in making out an apparent title, more beneficial than, or different from, the true one. The extensive heads in the books,—“Of Priorities among Incumbrancers,” “Of Notice,” “Of Constructive Notice,” “Of Tacking and Marshalling Securities,” “Of Protection through the Legal Estate,” and others of the like nature,—are sufficient proof that frauds of this kind have been by no means unfrequent. And it cannot be doubted that the cases in which frauds have been committed, and which, for various reasons, (such as the clearness of the law applicable to the particular case, or the circumstances of the parties entitled to relief or against whom relief was to be sought,) have never been brought into court,

must have been far more numerous than those which have been actually tried and reported.

The evil of fraud actually committed is, however, far less than that of expense incurred, and necessarily incurred, *in every case*, for the purpose of obtaining something like a reasonable assurance against the consequences of possible fraud or mistake. The enormous expenses which are daily incurred in sales and mortgages for the purpose of enabling a purchaser or mortgagee to make, and a vendor or mortgagor to satisfy, these requisitions, which would never be necessary under a general registry of title, have been often dwelt upon, and need now be only alluded to. In the words of the Real Property Commissioners, — “ A very inadequate estimate will be formed of the evils of the present system from merely considering the cases in which a loss actually does arise to purchasers or mortgagees from titles proving defective in consequence of the suppression of deeds. It is a consideration of the greatest importance, and one which presents the existing evil in the strongest light, that in all transactions respecting sales and mortgages of real property suppression of title is treated as a risk to be apprehended, and against which it is the duty of the professional agent to guard by every means in his power. In the process of investigation which is instituted as to the title, not only every document, the existence of which in any manner appears, and which by any possibility may affect the title, is called for, but various collateral sources of information, existing generally or in particular cases, are resorted to. Inquiries are made from the occupiers of the lands, and from persons who have long dwelt in the neighbourhood, county and local histories are examined, searches are instituted for land-tax assessments, awards under inclosure bills, grants from the Crown, grants of annuities, records of fines and recoveries, enrolments of deeds, judgments entered up in the several courts of record, securities given to the Crown, probates of wills, and administrations, and various other species of documents. In every case except where the property is too small to make risk important as compared with present expense, investigations of this nature are prosecuted to a great extent, and they occasion a

considerable portion of the delay and expense which are felt to be the great evils now attending the transfer of real property."

From this greater or less insecurity of all titles to land, and the certainty that every purchaser, by signing his contract, undertakes either to waive his right of having any security at all, or to incur a great but indeterminate expense in seeking such an approximation to security as the present system allows, it results that the market values of estates are deteriorated in an inverse ratio to their magnitude, titles defective in point of evidence but safe to hold, are rendered unmarketable, except under most depreciating conditions of sale, and small estates are unsaleable from the mere disproportion between their value and the expenses of the transaction. It is not fair, therefore, to represent the plan of a register as necessarily involving an addition to the present expenses attending the transfer of estates. On the contrary, it is probable that the saving effected in the expenses of making out and investigating titles will many times exceed the total cost of the registry establishment.

Among the minor advantages of a register may be mentioned the securing of evidences of title from loss and spoliation, and the extinction of all the embarrassments, now of such frequent occurrence, with regard to the production and the custody of title-deeds. Provisions might readily be framed which would greatly encourage the use of concise forms of conveyance, and the effect of the system, after it had been for some years in operation, in rendering covenants for title unnecessary, would further promote the same end.

The greater part of the objections which have been raised to the measure, appear to have been founded on the operation of the registers now existing in Middlesex and Yorkshire. But to rely on the working of those registers as affording any evidence against the principle of registration is to confound words with things, since nothing could be worse devised than the plan of those registers, or more unlike the schemes which we are about to consider.

Of the other objections which have been raised to a re-

gister, the principal are founded on apprehensions of improper disclosure of titles, delay, and expense.

1. The objection that a register would occasion an improper disclosure of private affairs is conclusively answered by the observation that though the design of a register is to secure the fullest disclosure to parties actually intending to deal with an estate, disclosure to any other persons is no more a part of the plan or a necessary consequence of it than it is of the existing system. The Bavarian register excludes all inquiries unauthorised by the registered owner, and Lord Campbell's bill contains provisions to the same effect, which we have no doubt would secure the end proposed. These provisions may, perhaps, be desirable for the purpose of allaying the fears of publicity which many persons entertain, but it is to be observed that there are opinions of great weight to the effect that no disclosure of the state of a man's title can be improper, at least under a register which has been for some time in operation, for then we confidently expect that the distinction between what are called holding and marketable titles will have ceased to exist, and every just title will also be a strictly legal one. In the mean time the register will, of course, contain no notice of defects at present in existence. That the fear of publicity is by no means universal, even among the members of that class on whose behalf the objection is mainly urged, will appear from the answer which was received by the Commissioners to the following question, circulated with two others among the bankers and merchants of London,—“Do you consider that the disclosure which an open register would afford of mortgages and incumbrances would be productive of more evil or good?”

Answer—(signed by Humphrey St. John Mildmay; John Cockerell; Thomas Wilson and Co.; Samuel Drewe and Co.; William Ward; George W. Norman; A. Lewis Gower; Fletcher, Alexander and Co.; Smith, Payne, and Smiths; Jones, Lloyd, and Co.; Grote, Prescott, and Co.; Williams, Deacon, and Co.; Roberts, Curtis, and Co.; T. A. Curtis; J. Thompson, S. Bouar and Co.; J. Horsley Palmer; John Rae Reid; J. O. Hanson; C. Buller; W. Thompson; J. B. Heath; Masterman and Co.; Barnard, Dimsdales, and

Co.)—" We think, upon general grounds, that any measure which tends to prevent misconception, and to secure accurate information respecting the circumstances and property of commercial men, must, on the whole, produce more good than evil; nor do we see reason to apprehend any serious mischief from the disclosure which an open registry would afford of mortgages and incumbrances, inasmuch as we are certain that more mischief arises in the mercantile world from false appearances of property, and erroneous impressions as to the real circumstances of parties than from any other cause whatever."

The apprehensions of delay and expense have been already answered in considering the advantages of the plan, for in our estimate of the effect of a register, the most important advantage to be derived from it will be a very great reduction of the delay and expense now necessarily incident to almost every dealing with real property. If it is objected that in small properties delay and expense are obviated by dispensing with any investigation of title at all, we answer that such neglect is not only fraught with the greatest immediate danger, but in almost every case, is ultimately the cause of much greater embarrassment and expense than it originally saved, and, while the register would materially diminish the delay in cases where the title was investigated, its existence would be no obstacle to the accepting of a title without examination, if it were thought fit to do so. On the question of expense we would suggest that some expedient might be adopted for the purpose of relieving small properties from the disproportionate charges to which they are now subject, and of regulating the costs of registration to some extent upon an *ad valorem* principle. But the expenses of a register would not, according to the estimate of the Real Property Commissioners in 1830, be at all heavy. They say,—“ In order to cover the expenses of the office and the costs of registration, we think the average expense of registration may be fairly taken at 35s., and the average costs of searching the indexes and obtaining copies of them on the occasion of a purchase, at 10s.” From another part of the report it appears that the estimate of the expense of registration is founded on the assumption that the

average length of deeds would be forty-eight folios, a high estimate even at that time,—and that an office copy would be taken. The expenses consist of—

6s. for registering.

2s. — postage to town.

8s. — office copy to be sent down to purchaser.

2s. — postage of office copy.

7s. — solicitor's charges for letter and transmission.

£1 5s.

In a small transaction the office copy might be dispensed with, and the omission of the charge for this, with the saving on the postage, would reduce the estimate to 14s.

If the use of printing and of maps were adopted, according to a suggestion to be presently made, it is probable that the expenses of the establishment might be defrayed by the sale of office copies and of maps. But if this were not so, yet, as there is no doubt that, on an average, the expenses of dealing with estates would be enormously diminished by the register, we do not see why the registration and searches should not be made gratuitous, and the expenses of the establishment raised by a general land-tax.

We now proceed to the consideration of the method of registering titles. If we assume that no material alteration in the existing system of conveyancing is to be attempted, and that the same deduction and investigation of title are to be resorted to after the full establishment of the register as at present, the principal questions to be considered with reference to the form and details of the registry will be the following : —

1. Whether the instruments are to be registered at length, or by memorials; and, if at length, whether the originals, or copies, should be deposited at the office.
2. Whether the indexes should be mere indexes of names of persons, or should contain distinct heads of reference for each estate, or, as a compromise between these opposite principles, whether territorial subdivisions of the country into parishes or other convenient districts should be resorted to, with a separate index of names to each district. And in connexion with this branch of the subject, it may

be convenient to consider whether there should be a central office for the whole of England and Wales, or separate offices for separate districts, or local registers in connexion with a central office.

3. On what principle judgments, wills, and other sources of title affecting lands by sweeping descriptions, or otherwise without furnishing a clue to the specific estates affected, or which may operate on estates acquired at a future time, are to be indexed in connexion with a scheme requiring separate indexes to each estate.
4. Whether or not registration should be made as essential as execution to the validity of documents required to be registered; and if not, how far purchasers with notice and volunteers are to be bound by unregistered instruments.
5. Whether it would be desirable and possible to make the register available for the purpose of receiving and preserving evidence of matters of pedigree, and other subjects of oral testimony.

1. With respect to the first question, we think it clear that instruments should be registered at length. The object is to provide a means of learning with absolute certainty the state of the title at any specific time. A system of memorials giving notice merely of the existence of documents by which the title may possibly be affected would not do this, for the document memorialised may be lost, or not forthcoming. Memorials, too, would occasion much useless trouble and expense by giving rise to inquiries and searches for instruments which, when examined, prove to be unconnected with the title in question. By registering deeds at length all the embarrassments which now frequently arise with regard to the custody and production of them, and all danger of loss and suppression, would be avoided. A prejudice seems to exist against the deposit of the originals. Either the original must be deposited, and an office copy given to the owner of the estate, which copy will be admissible in evidence, or the registered copy must be made evidence in the absence of the original; but we greatly prefer the deposit of the originals. If the originals are deposited, some regulation will be expedient for securing, as far as possible, a uniformity of size and material. In either case it will often be necessary to have

several secondary copies made for use in the searching office. It will also be necessary, on many occasions, to furnish office copies of registered documents. With a view to the ready and cheap production of accurate copies, it has been suggested by Sir F. Palgrave that all the entries in the registers should be printed on the establishment. We think this proposition deserving of serious consideration. We have ascertained that the expense, for paper and print, of producing fifty copies of a large folio page of close print — such as that in which the “*Edinburgh Review*” is printed — containing, on the average, one thousand and eighty-eight words, (rather more than fifteen folios,) would be *5s. 7d.* In 1829, it appears from evidence taken by the Real Property Commission, the average length of deeds in an extensive London agency office was under three thousand five hundred words; and as the simpler and smaller transactions in the country do not reach the London agents, no doubt the country average is lower. The average length of deeds registered in the Bedford Level was, in 1829, lower. This would give *22s.* for the average cost for printing fifty copies of every registered deed. But the length of conveyancing forms is now much below the standard of 1829, and the use of very concise forms is daily gaining ground. The most important advantages to be expected from the use of printing would be the accuracy and compactness of the records, and the facility of reference. Assuming, with the Real Property Commissioners, that seventy thousand deeds would be annually registered, if as many as ten copies of each deed were preserved in the office, and the average length of each deed were four folio pages, we should have annually four thousand folio volumes of seven hundred pages (printed on both sides). Each of these volumes, consisting of substantial paper, would be less than two inches thick; and the year's records might be deposited in a closet of about eight feet in each of its dimensions. Again, even the individual entries in the indexes might be made by impressions from types. Several copies of the indexes might be thus readily provided, so as to enable the several clerks engaged in searches to proceed without mutual interruption. All apprehensions of danger to the records from fire or tumult might be completely

removed by depositing duplicates of all the documents in some distant repository. Again, if it should be thought advisable that each district should possess a register office of its own, this object may be easily attained in conjunction with a central office, from which duplicates might issue to the several local registrars, who would perform the office of agents between the country solicitors and the central office.

2. With respect to the indexes, a very little consideration is sufficient to show that an index of names, without territorial subdivision, is impracticable. In the Middlesex Registry the annual entries, in 1829, under the letter B, were two thousand; and, according to an estimate made by the Real Property Commissioners, the number of entries for all England under the same letter would be about eighteen thousand nine hundred. So that in fifty years the entries among which a purchaser from a Mr. Brown would have to search would amount to nine hundred and forty-five thousand under the letter B; and of these fifty-five thousand would be Browns. The Smiths would be one hundred and twenty thousand. If the search is to be made under names, it is therefore evident that the country must be subdivided into small districts, with separate indexes, so as to keep each index within reasonable compass. But, even then, many useless references would be caused; and where an estate extended over several districts several searches would be necessary. In order to eliminate all useless references, and to render one search sufficient in all cases, we must provide in the index a separate head for each estate. In other words, the index to the register must be a collection of concise but complete abstracts of all the registered titles; and the business of the keepers of the index will be merely to make additions to the several abstracts or heads in the index, as new documents come in to be registered. It is the want of these distinct heads that renders the existing registers in this country a nuisance instead of a benefit. Under a system which would keep the title to each estate distinct, a search in the register would be perfectly easy and simple. The intending purchaser would merely transmit to the registrar the particular name or mark distinguishing the estate in question, and would receive back a copy of the entry in the index

relating to that estate, carried back as far as he might require, together with the result of an easy search in the indexes to wills, judgments and sweeping assurances. This is the principle suggested by Mr. Brodie and Mr. Tyrrell, approved by the Real Property Commissioners, and embodied in the bill originally proposed in the House of Commons by Lord Campbell in 1830, and now under the consideration of the House of Lords. This plan of registration does not rest on speculation merely, but has been regularly applied, during the period of a century, to all the titles held under the extensive manor of Sion, and with the most complete success.

A single office for the whole of England and Wales would possess many advantages over distinct local registers. The difficulty and expense of procuring skilful and efficient superintendence, and indeed all other expenses, would be much less on the former than on the latter plan, and the great inconvenience of diversities of practice, inevitably attendant upon a system of independent offices, would be avoided. The Real Property Commissioners recommended a central office in 1830, when the present means of rapid communication between distant places did not exist. At the present day, indeed, when two places in Yorkshire, fifteen miles apart, may be more remote from each other for the purposes of communication than from London, a metropolitan office would be preferable on the ground of expedition alone. Local offices to act, at the option of parties, as agents merely for the purposes of transmission might, however, be found convenient.

3. Judgments, and other securities and charges capable of affecting after-acquired property, cannot possibly be indexed at the time of entering them up, with reference to all the estates which they may affect; and wills, assignments by sweeping descriptions, titles of assignees in bankruptcy, &c., unless subjected to regulations which we think would be inconvenient and oppressive, come under the same category. These must necessarily be entered in an alphabetical index of names; and some regulations for shortening the searches, analogous to that introduced by Sir E. Sugden with reference to judgments, requiring in the case of every sweeping security, of bankruptcy, &c., a new entry every five years,

might perhaps be adopted with advantage. But provisions for the registry of sweeping assurances would require to be framed with great caution in order to prevent that evasion of the spirit of the measure which the too ready admission of such documents would admit of. An evil of this kind is felt in the Yorkshire registers, where the officers have endeavoured to meet it by making requisitions with respect to the descriptions in the memorials of the properties conveyed, which are not authorised by the statutes establishing those registers.

4. Upon the question whether registry should be rendered essential to the validity of the title to be registered, there has been much difference of opinion. But we believe that we are supported by a great preponderance of authority in thinking that (without interfering with the jurisdiction of equity in cases of actual fraud, as distinguished from mere neglect of unregistered rights) registration should be made as essential to the validity of an instrument affecting real property as signing is made by the Statute of Frauds. By no other means can the regular and prompt registry of every document be secured, and by no other means can the numberless questions which now arise as to notice, with all the niceties of actual and constructive notice, be excluded.

5. With respect to the use of the register as a means of receiving and recording evidence of matters of pedigree, and other subjects of oral testimony, we are not prepared with any specific recommendation, but merely throw out the suggestion that means might probably be found for making the establishment available for such purposes.

There is one question which, though it relates to a matter rather of detail than of principle, should not be passed over; we mean, as to the expediency of adopting a general map as the foundation of descriptions on the register. In their Second Report, the Real Property Commissioners state that they had particularly considered the proposal of adopting a general map as the basis of a register, and "came to the conclusion that the preliminary expenses of framing a general map, or description—the difficulty of tracing land after complicated subdivisions or variations of boundaries—the diffi-

culty of applying a description by boundaries to certain species of property—together with the alterations which would be required in the mode of describing estates in deeds, and in the practice of conveyancing, render it inexpedient to attempt the establishment of a register in this country founded on such a basis.” We believe that the consideration which principally induced the Commissioners to decide against the use of a map was the apprehended expense of a general survey. Since that report was presented the great value and importance of maps in conveyancing have been better appreciated, and the use of them has greatly extended. This has been partly caused by the proceedings under the Tithe Commutation Act, which have not only furnished us with more exact data for determining the expense of a general survey than formerly existed, but have actually resulted in the efficient completion of the survey itself to the extent of about one-fourth of the entire surface of England and Wales.

In two parliamentary reports—the Report as to the Survey and Valuation of Ireland, (1824,) and the Report from the Select Committee of the House of Commons on the Survey of Parishes, (1837,)—abundant evidence will be found as to the practicability of making a correct map of England and Wales, similar to that which has been already completed for Ireland, but on a larger scale. The Town Land Survey of Ireland is on the scale of six inches to a mile, or an inch to thirteen chains and one-third; but for conveyancing purposes a scale of about twenty-seven inches to a mile, or an inch to three chains, would generally be requisite. A number of excellent maps on this scale have been compiled for the purposes of the Tithe Commutation which would be at once available. We have ascertained that at least one-fourth of the whole number of Tithe Commutation maps are what are called first-class maps, which, together with some others in the same office of sufficient accuracy, might, with a very little additional trouble, be made available for the purposes both of conveyance and registration. Indeed, these maps are already used to a considerable extent in describing the parcels in conveyances, either by means of copies of the maps, or merely by refer-

ences to the numbers by which the different parcels of land are distinguished in them. The advantages resulting from this mode of description are sufficient, independently of the question of registration, to render the completion of a general map a matter of great importance. The utility of such a survey has often been urged by competent authorities. In the Appendix to the Report of the Committee of 1837, already referred to, the evidence of the Rev. Mr. Jones, one of the Tithe Commissioners, is given. In answer to questions by Sir James Graham, he says, "No survey of England has been made since the compilation of the Domesday Book; and in the absence of this particular mode of ascertaining metes and bounds, property has been distinguished with great difficulty, great expense, and much litigation,—enough to make all the lawyers who are acquainted with it, think that good maps would prevent much litigation."

As a means of facilitating the conveyance of property merely, it would not fall within the duty of this Committee, under the present reference, to consider the utility of a general map; but it is because such an index to the landed property of England would also furnish by far the best foundation for an index to a general registry of titles that we now urge it upon the Society's attention. Nothing is more essential to the efficiency of a general register than facility of search, and nothing will tend so much to facilitate search as a good index founded on a description of estates by reference to a general survey. We understand that the searches at the Tithe Office are satisfactorily and expeditiously made, and that the tithe rent-charge fixed on any piece of land can be very speedily ascertained. From the experience of the same office we gain also this important information—that the maps and records are, without any difficulty, adjusted to alterations in the descriptions and boundaries of the lands charged.

In many foreign countries the system of conveyance and registration on the basis of a map has been in long and exclusive use. In France the great territorial survey, or cadastre, has been in progress for many years. It was suggested in 1763, and after individuals of the highest scientific reputation—Messrs. Lagrange, La Place, and Delambre—had been

consulted as to the best mode of proceeding, operations were commenced in 1808. The survey is under the management of a central body acting in conjunction with the local authorities. The classification of lands according to an ascertained value is made by three resident proprietors of lands in each district, assisted by the municipal council and the chief officer of revenue. This survey is now complete and accurate, and conveyances are always made by reference to it. The system in most other European states is very similar.

In Sweden a registry on the basis of a general survey has been in operation from the time of Charles XI., and has given universal satisfaction. There the maps are lithographed, and sold for a mere trifle. On every conveyance two copies of the map of the estate must be deposited: one in the local registry, and the other in the central office at Stockholm. The surveys are periodically revised by officers regularly educated for the purpose.

In our own colony of South Australia the experience of many years has shown, that the use of a government survey for conveyancing purposes may be rendered quite consistent with English laws and habits.

The expense of country surveying at the present day varies from about $1\frac{1}{2}d.$ to $1s. 6d.$ per acre, on a scale of an inch to three chains; and no doubt an extensive survey, made with the assistance of unemployed naval and military officers and soldiers, might be made at a very small cost, probably under $6d.$ per acre. There are 37,094,400 acres in England and Wales, and an original survey of the whole might therefore be completed for about £927,300. But, as we have seen, more than one-fourth of the work is already performed. The maps might be lithographed, and the sale of copies would defray a great part of the expense.

The plan of registration which we have been considering involves no direct interference with the present system of conveyancing, beyond the imposition of the ceremony of registration as an additional requisite to the validity of transfers of real property. But, as Mr. Hayes has shown (2 Real Prop. Rep. Append. p. 446), the probable effect of a perfect

register on the proposed plan would be ultimately to establish a universal system of trusts, and to render the legal title wholly unimportant. Another scheme for a register of a directly opposite nature has been proposed, its essential characteristic being to render notice of trusts unimportant in all dealings with estates for the purpose of alienation or incumbrance, and to provide for the production, in every case, of a clear legal title, unincumbered with any trust or any derivative legal title other than that of a mortgagee, judgment creditor, lessee, or the like; so that every vendor or mortgagor, however limited his beneficial interest may be, will, on the face of the transaction, appear to be the absolute owner, subject only to any such simple derivative legal title as may be admitted on the register, in the same manner as, on the Stock Exchange, a trustee appears to be absolutely entitled to the stock which he transfers. See Mr. R. Wilson's "*Outlines of a Plan for adapting the Machinery of the Public Funds to the Transfer of Real Property.*" This plan is now under our consideration, and we propose to make it the subject of a separate Report.

SECOND REPORT.¹

In their first Report upon the above-mentioned reference this Committee expressed their concurrence in the well-known proposal of the Real Property Commissioners to establish a general register of titles. They will now consider whether the register might not be so arranged as to furnish a vendor with some direct and simple evidence of his actual ownership, instead of leaving the purchaser to collect and infer this fact by investigating the past history of the property. Whether, in short, land might not be made transferable like stock in the public funds.

¹ This Second Report on Registration is also the Report of this Committee on a reference made to them in 1844, to consider a paper printed and submitted to the Society by Mr. Wilson, one of its members, entitled "*Outlines of a Plan for adapting the Machinery of the Public Funds to the Transfer of Real Property.*"

The necessity of deducing a retrospective title seems to be the one great obstruction which at present impedes the alienation of real property. For whatever increased facilities of transfer may be afforded by the removal of the cumbrous technicalities of attendant terms, or by curtailing the verbiage of legal instruments, or again by recording the elements of the abstract of title — it is in their tendency to simplify the long detail of retrospective history that such reforms must be principally beneficial. The mere instrument of transfer might be left to simplify itself if the title were made simple. Now is retrospective deduction of title a necessary evil or not?

There are several general considerations which point towards a negative answer to this important inquiry. For instance, it seems absurd to require more evidence in an amicable transfer than in a hostile litigation. The mere possession of the ostensible owner is a title against all the world till affirmatively impeached on specific grounds, but the most willing purchaser pleads the general issue to his vendor's title, and puts him upon the proof of the whole of it.

Again, it seems a waste of labour to require the same thing to be done several times over. An estate is sold, the purchaser first inquiring into its adventures for the previous sixty years. Presently it is resold, and the same tedious narrative of undisputed facts is subjected to the critical acuteness of a second conveyancing counsel. However, the second purchaser is satisfied, we will suppose, and wishes to raise money on mortgage. The mortgagee goes into the inquiry again. Every fact, though undisputed, must be affirmatively proved; and the proof must be repeated every time the estate is dealt with.

If this were some remnant of ancient forms, inconvenient at the moment, but gradually wearing itself out, it might be tolerated; but, on the contrary, our system of titles seems to progress only in complication. The more frequently real property is dealt with, the more laborious it becomes to deal with it. Every transaction which is occasioned by increased commercial activity, or promoted by judicious amendments of the law, adds a new chapter to the future abstract of title: and it is usually found that the last twenty years of a modern

title fill as many sheets of the abstract as the first forty years.

The Committee have thought it right to mention some of the antecedent considerations, which have led them to entertain so great an innovation as the abolition of retrospective deduction of title. If a further reason for this were wanted, they would dwell on the effect of retrospective titles on the transfer of small properties. It has been justly observed by a recent writer, that "the time is fast approaching when the expense of any dealing with real property will be so great as utterly to preclude the poorer classes from the acquisition of land." Practically speaking, small properties cannot be dealt with, except as articles of luxury — the large proprietor is debarred from selling, and the poor man from buying, by the expense of the transfer. Retrospective titles, then, are not merely a legal inconvenience, but a great social evil.

The next point to be considered is, how are these titles to be got rid of? They have been dispensed with in Prussia and other parts of Germany, but only by means of a degree of government interference which would scarcely be tolerated in England, nor would indeed be easily applicable to the complicated limitations of English settlements. But we have a class of non-retrospective titles within our own observation and experience in the instance of personal property; and more particularly of that description of personal property which has been already referred to, namely, stock in the public funds.

This large mass of property is held under titles deduced through a regular series of recorded instruments of transfer. Moreover, it is very frequently the subject of settlements and other special dispositions: and yet it is transferred without any retrospective inquiries whatever. Now the cause of this remarkable facility of transfer seems to be that the legal ownership of funded property, instead of being cut up into fractional portions, or "*estates*," when effect is to be given to derivative interests, is always vested in some recognised person or persons as an entire thing, however much the ordinary or presumptive right of the legal owner to the enjoyment of the property vested in him may in some cases be controlled or

modified by trusts or personal duties contracted by him for the benefit of others.

Thus the distinction between the title to land and the title of stock seems to arise from a difference in the modes adopted in the two cases for giving effect to derivative interests common to both. And if this be so, it is at least deserving of the most mature consideration, whether, as retrospective titles have been dispensed with in the one case, they might not be got rid of in the other.

The most prominent feature in the title to stock is, as has been mentioned, the registration of the ownership as an entire thing in the name of the actual proprietor, and the transmission of the registered ownership, in its entirety, from hand to hand. Now, in proceeding to apply this principle to real property, it is obvious to remark that it might admit of some considerable development. The ownership of the land might be registered subject to a derivative interest, such as a mortgage, a lease, or the like; and the derivative interest itself might form the subject of a subordinate registered ownership. An estate might stand in the name of A as owner, subject to a mortgage standing in the name of B, to a lease in the name of C, and even to a settlement in the name of D. And the estate, the mortgage, the lease, and the settlement would be transferable like funded property; because all would stand registered, in like manner, in the names of their respective owners.

Moreover, it would seem that this kind of registered ownership might, if it were thought desirable, extend to every derivative interest belonging to a person in being. But interests limited in favour of unborn descendants would have to be registered in the names of trustees. And here the Committee arrive at a point which they are anxious to consider at the outset, namely, the bearing of such a trusteeship on the security of contingent interests.

Efficient precautions against forgery being for the present assumed, contingent interests could not at any rate be placed in a greater peril than that to which a large class of them were subject under the common trust to preserve contingent remainders. And if it be said that this latter risk is now

removed, it may be answered that the power of selling and exchanging, which is still a common form in every settlement, involves a risk of exactly the same kind. If such a power is only to be exercised with the consent of some person in being, a similar restriction may be provided by the plan of registration which the Committee are about to consider; and if without consent, then the estate is already placed in the power of trustees.

It may be concluded, then, that contingent interests would not be placed in any new peril by their proposed dependence on trustees. And when it is considered how large a mass of funded property is held under trusts, and how well (speaking generally) such trusts are administered, it is not unreasonable to assume, that the occasional and cautious interposition of similar machinery, as applied to a description of property which can seldom be made the subject of a fraudulent sale without immediate detection, would not form an objection to a comprehensive plan for extricating land from the labyrinth of complication in which its titles are in a manner lost: even though it were thought probable that a trusteeship would be voluntarily resorted to in many cases, as a convenient method of giving effect to derivative interests in favour of persons in being.

For it must not be supposed that derivative interests belonging to persons in being would necessarily be registered in the names of their proprietors, immediately against the ownership of the property affected by them. On the contrary, the scheme under consideration provides ample machinery for the registration and protection of trust estates.

There would in fact be two registers, the one comprising what may be called the legal estate, namely, the ownership of the land and that of each derivative interest registered in its proprietor's name as above mentioned; and the other being a subordinate and dependent register of equitable interests or trusts.

And the practical difference between the two classes of registered interests would be, that the registered proprietor of every legal interest would be a necessary party to an uncumbered transfer of the land, so that a transfer, if made

without his concurrence, would be subject to his interest ; whereas the registration of an equitable interest would only suspend the completion, or rather the complete effect of a transfer, not concurred in by its proprietor, until after the expiration of a notice transmitted by the registrar to the registered equitable proprietor ; that is to say, the legal proprietor would have to concur actively, the equitable proprietor passively, if it were intended to discharge his interest. The legal register would, as has been mentioned, be an adaptation and development of the present register of funded property ; the equitable register would be an application and extension of the protection afforded to the owners of equitable interests in such property by the writ of *distringas*.

Having disposed of the question of security, the Committee will now proceed to a more particular description of the plan of registration which has been brought before them for abolishing retrospective deduction of title : premising that although described for the sake of greater clearness as a comprehensive machinery extending over the whole of England and Wales, the plan in question might, in the first instance, be tried on a small scale and at a trifling cost in any district possessing a Tithe Commutation Map of the first class, and afterwards be extended by degrees to the rest of the country.

Let it be supposed, however, that we have a national map on the scale of a tithe commutation of the first class, divided into parishes, and engraved for sale in small compartments.

Let each material unit of real property (such as a field or a house) situate within a given parish, be distinguished by a number on the appropriate division of the national map.

Let each parish have its register of the properties contained in it, founded on the map, and provided with two blank columns, one for the value of each unit of property, and the other for the date of the first registration of the ownership of it, as presently mentioned.

Let the properties in the parish be separately valued at periodical intervals of time for all purposes of general and local taxation, and let their values be entered in the appropriate column of the register of properties.

When the legal ownership of the properties in the parish

has been ascertained in the manner presently proposed, let the date of the first registration of such ownership be inserted in the remaining column of the register of properties, and then let the whole of the statistical information collected as above mentioned be printed.

The register office would be a central one, situate in London. A parish would be placed under this office, on its own application, signified by a resolution at a vestry meeting.

One of the parochial officers would thenceforth be constituted the local agent or servant of the central office. His duties as local registrar would be extremely simple, as will appear in the sequel.

A commissioner from London would hold a meeting on the spot, as if he were about to enclose a common. He would have before him at the meeting the engraved map of the locality, and the statistics of the properties delineated upon it. He would call for and receive statements, in writing, of the names and addresses of persons claiming to be registered as the legal owners of the respective properties. In very many cases these claims would be undisputed. In many other cases the parties interested would readily concur in the nomination of one or more of themselves or their friends to the legal ownership. In disputed cases the commissioner would register the name and address of the person in actual possession or receipt of the rents; who by being thus invested with the legal estate as the representative of all persons concerned, would be restored to the position of the ancient freeholder. In some few extreme cases of disputed and very confused titles, the commissioner might be unable to discover who was in possession or receipt of the rents, and then the property would remain registered in the name of a public officer, till the parties claiming to be interested in it could settle their differences amicably or judicially.

By these means the legal estate in the properties contained in the parish would become vested in a body of registered proprietors; and conveyances would thenceforth be effected upon short printed forms like those used for the transfer of funded property.

The registered title would be subject to the risk of con-

ceased equitable claims for a period long enough to allow ample time for their registration. The Committee would propose five years, with a moderate extension in favour of persons under disabilities, limited to an extreme period of twenty years from the date of the first registration of the legal ownership.

Existing derivative interests, such as mortgages, leases, and the like, would be admitted to the legal register on the application of the person claiming to represent them, at the peril of an action for slander of title, if registered without reasonable and probable cause. And a derivative interest so registered would be transferable like the registered legal ownership of the land itself.

The proposed system of registration might thus be started without any investigation of existing titles. After the lapse of a few years every unregistered interest would be invalidated, and the whole title would appear upon the register; and the machinery would then work as follows:—

The registered land-owner would be the holder of a certificate or certificates expressive of his ownership. The certificate would in fact be an office copy of a page in each of two duplicate books kept at the central and local register offices, and the issued certificate would be distinguished by the number of the page of the recorded certificates. And as the certificate would be surrendered and replaced by a new one, on the occasion of each dealing with the property (as explained in the sequel), its distinguishing number would be subject to continual change: and forgery would thus be prevented by a precaution similar to that which prevents (speaking generally) the forgery of transfers of funded property, namely, by the concealment from an intending forger of the number of the certificate in the one case, as of the amount of the stock in the other.

Joint owners would hold duplicate copies of the issued certificate, but would be guarded against the forgery of each other by private marks or numbers upon their respective copies.

Any information contained in the register would be furnished at a moderate fee to any applicant: always excepting the number of the current certificate, which would be kept

secret, inquiries being made by reference to the numbers of the properties on the published map.

The land-owner might have arranged his registered units of property in his certificates according to his discretion; combining or separating his titles at pleasure. And he might change the arrangement as often as he pleased, by surrendering the existing certificates and taking out new ones.

If a registered unit of property were to be divided, it would be surveyed at its owner's expense; a map showing the divisions of it would be registered and lithographed; and one of the lithographs would be annexed to each successive certificate issued for any of the divided portions of it.

An entire parish might be resurveyed at any time at its own expense, if the properties contained in it had been much changed by building or otherwise.

A Sale would be effected by surrendering the current certificate of ownership, with a short transfer indorsed upon it. The surrender might be made by sending the indorsed certificate to the central register office, or depositing it with any local registrar for transmission to London. And new certificates would be issued from the London office in the purchaser's name, and delivered out to him, either in London or at any local office, according to his convenience.

An Equitable Mortgage would be effected by a mere deposit of the certificate, accompanied by an unregistered memorandum of deposit.

A Legal Mortgage would be effected by surrendering the current certificate of ownership properly indorsed, and taking out a "certificate of mortgage" in favour of the mortgagee, and a new certificate of ownership, subject to the mortgage, in favour of the mortgagor. The mortgage would be transferred by indorsing and surrendering the certificate of mortgage and taking out a new one in the transferee's name. And it would be discharged by indorsing and surrendering the current certificate of mortgage and cancelling the recorded entry of it.

A Lease would be effected by a deed as at present. It would be deposited at the register office. The landlord's certificate of ownership would be surrendered and replaced by a new certificate of ownership subject to the lease. The lessee

would receive a "certificate of lease." The lease might be assigned by indorsing and surrendering the certificate of lease, and taking out a new one in the assignee's name. It might be surrendered by being transmitted to the registrar with a proper indorsement upon it. On the expiration of the term the recorded certificate of lease would be cancelled.

A Judgment would be registered by entering the particulars of it, at the creditor's peril, against any properties standing in the debtor's name. The judgment creditor would receive a certificate importing the registration of the judgment, and his lien would be discharged by indorsing and surrendering the "certificate of judgment."

We proceed now to the

Equitable Register.—Suppose an estate to have been transferred by the means above described into the names of the trustees of a settlement. The trustees would thus have become the holders of duplicate certificates, distinguished from other certificates by a common number, and guarded as between themselves by distinct private marks or numbers. It is further desired to give the beneficiaries a direct control over the trustees. For this purpose the recorded and issued certificates of legal ownership would express that the property was under trust, and would contain a reference to a page in the equitable register; and the same notification and reference would be continued in any substituted certificates for the trust property, so long as it remained such.

The settlement, or a duplicate of it, would be deposited at the register office, and conveniently bound up in a book.

The page of the equitable register, referred to as above mentioned by the certificates of legal ownership, would form an index to the roots of equitable titles arising under the registered settlement.

Any person claiming an equitable interest under the settlement, whether existing at its date or arising afterwards, would be entitled to register his name and address as those of the owner of such equitable interest. He would receive an official "certificate of equitable registration," authenticated by a distinguishing number, and entitling the person named in it to a moderate notice previous to the passing of a legal transfer.

The registered equitable title would be assignable by deeds registered according to Lord Campbell's plan, and on the occasion of every registration of an assignment, the current certificate of equitable registration would be surrendered and a new one taken out in favour of the assignee.

Let it now be supposed that the trustees, as registered legal owners, propose to transfer the property. Before allowing the transfer, the registrar turns to the appropriate page of the equitable register, where he finds entries of several subsisting equitable titles, each standing registered in the name of its owner, whose address is also entered. Notices are sent accordingly by post from the register office. If the registered equitable proprietors are cognizant of the intended transfer by the trustees, and consenting to it, they fill up and sign a printed form of consent indorsed on their certificates of equitable registration, and transmit them by post to the registrar. Otherwise the transfer is either delayed, for perhaps a month, to afford to the equitable proprietors an opportunity of interfering to prevent it, or else made subject to their registered interests.

It has been suggested that difficulties might arise in case of the accidental loss of certificates. The Committee do not, however, entertain any apprehension on this point, for it is not found in practice that persons lose their certificates of shares or their title-deeds. The proposed certificates would be instruments of some bulk made out on sheets of demy paper, with large official seals upon them. Forms of this kind have been under the attentive consideration of the Committee, and will be laid before the Society.

The question of expense has been already sufficiently considered by the Committee in their first Report. The principal item would be the cost of the original survey and map, which would not exceed one shilling an acre, and might be greatly reduced, if not altogether saved, wherever a tithe commutation map of the first class already exists.

On the whole, the Committee, after having bestowed much time and attention upon the plan before them, see no reason to doubt that it might be rendered perfectly efficient for the purposes for which it is designed; and they are of

opinion that its adoption would raise the market value of landed property without diminishing its security.

ART. VIII. — A NEW GENERATION OF LAWYERS. —
LEGAL EDUCATION.

THE grandfathers of the race of lawyers now entering on professional life, are fast dropping into their graves. Of the contemporaries of Lord Eldon there is hardly a survivor; and of those who were bred up at his feet, and who took him as their Gamaliel, how few remain! His decisions are still cited — when will they not be? His politico-legal opinions are now fast passing into oblivion. His general creed on this head (for with his political opinions we have nothing to do), that the English law was the perfection of human reason — that its fundamental doctrines must not even be inquired into — that however doubtful its application to particular circumstances might be, the doubt must not be extended to the law itself — how many men are to be found now holding these sentiments? And yet, twenty-five years ago, they were the approved maxims, the settled axioms on which the government of the country was carried on: the holding of them was an indispensable requisite to the holding of office and station; and woe to the unhappy wight who ventured to hint a suspicion of their correctness! And yet the lawyer who should entertain such doctrines in the present day must, indeed, have been curiously brought up, and have managed to pass through life with a mind singularly constructed: for a lawyer is essentially one of the people, sometimes leading, but more generally following the opinions of the mass; and now the feeling in favour of the reform of the law is universal. It is quite possible, however, that, as the grandfathers went too far in one direction, the grandsons may go too far in the opposite course; and it is of some importance to endeavour to ascertain the feelings and inclinations of the new generation of lawyers, who will soon push us from our stools. It is of importance to the community at large, but it is of peculiar interest to those public

bodies who stand charged with the education and discipline of the junior members of the profession.

So far the indications which are given by them appear to us to augur well. The movement which has been made with respect to legal education, although not originating directly with the students of the Inns of Court, has not been looked upon by them with indifference; and there is already enough to show that it will be acknowledged by them as a right step on the part of the Benchers, and be received with thankfulness and a desire to profit by it to the utmost. This also shows the readiness with which the rulers of the Bar, mixing as they do among and forming part of the people, fall in with the wishes and meet the wants of the age, and wisely, even for the preservation of their own interests, have they so resolved. There is, we think, a prudent rational wish, conservative, in the best sense of the word, on the part of the younger members of the profession, to leave untouched all established bodies, provided only they will recognise the increasing wants of the age. They desire a movement, but they desire also to see at its head the acknowledged authorities of the profession. So far for the Bar and its students. Neither do we see any backwardness in the other branch of the profession to express the same feelings, or to meet the demand in the same way. In the absence of the Inns of Court we may, perhaps, look to the part taken in this matter by the Incorporated Law Society, and here we find that lectures and examinations have been for some time established. It has indeed been supposed, but we believe without any reason, that a hostility has been felt by this respectable Institution towards the improvement of the law. We know not on what foundation this rumour rests, unless it be that by one of its lecturers some feeble criticism, neither correct in fact or spirit, was attempted on some of the Real Property Acts. How far this was thought to be agreeable to the committee of this Institution, or with what kind of applause such expressions were received, we do not know. But we are sure that we need not point how false and dangerous a position would be occupied by a body situated as the Law Institution is, if an idea were to get abroad that it sets itself up

in opposition to the expressed wishes of the legislature. Whatever might be its respectability, it would be from that moment doomed; its days would be numbered; and it would bring not only ruin on itself, but inflict serious injury on the branch of the profession, the feeling of which it professed, but most incorrectly, to represent. If the dregs of an exploded school were supposed to have settled there, and were working mischief, it would be full time to see how it could be counteracted, and the means would not be difficult to find. It would indeed be a serious evil if, while the ancient legal institutions of the country were being renovated by an improved and healthy spirit, a modern institution were to thwart and endanger measures introduced for the public benefit; for surely it is the unquestionable duty of the practitioner, of whatever branch, to assist the intentions of the legislature as shown in the statute book; not to criticise and raise doubts on acts of parliament just as they come, or before they come, into operation, but when such doubts arise in practice to endeavour to remove them. This is shown in a marked and highly honourable manner by Sir E. Sugden, who, in the last edition of his book on Vendors, with an authority inferior to none, supports the general objects of all the acts of last session without cavil or remark.

As the friends, then, of an established institution, conducted in an enlightened spirit, we are happy to say that we believe that the rumour, which we have thought it right to notice, with respect to the Law Society is without foundation, and that there has been no attempt, and, as we trust and believe, no wish to obstruct any of the recent amendments of the law, and that in this they follow the wise course pursued by the Inns of Court, which content themselves with the regulation of the discipline of their branches of the profession, and leave legislation, in their corporate capacity, alone.

We know not how far this erroneous notion may have led to a correspondence which has taken place between certain gentlemen acting on behalf of a proposed articulated clerks' Society and Lord Lyndhurst, when Lord Chancellor, and

Lord Langdale, as Master of the Rolls. This correspondence has been communicated to us ; and, at the present juncture, we have read it with interest. The first letter is as follows, and appears to us highly creditable to the writers :—

MR LORDS, — We, the undersigned committee of articled clerks to attorneys and solicitors in England and Wales, having met together for the purpose of considering the propriety and necessity of establishing a general Law Students' Society, and having resolved that such a society would be a great boon to the Profession to which we have the honour of belonging, it was determined that our first step should be to obtain the sanction of your Lordships. We have, therefore, taken the liberty of addressing to your Lordships the following observations, under the full conviction, that as your Lordships have ever lent your powerful influence towards the promotion of all wise and judicious reforms in the law, and of all measures tending to raise the legal profession in efficiency and public estimation, your Lordships will not deem it an intrusion on your valuable time when we humbly state that we entertain the highest sense of the importance of the society in question ; but that, on the contrary, your Lordships will grant us your sanction, and render us all proper encouragement.

Our objects may be briefly stated to be educative and protective. We humbly think that nothing will tend so much to secure the honour, respectability, and efficiency of our profession as carefully watching the education of its rising members. It was to promote this (as your Lordships are well aware) that the examination preparatory to the admission of attorneys and solicitors was established ; a measure which, in our humble opinion, has already been of great advantage, and which bids fair for much greater hereafter. Your Lordships' attention may not have been called to the fact that there is no institution existing, either in the metropolis or elsewhere, receiving the general support of the profession, calculated to assist the articled clerk in his studies, or to aid him in his preparation for the examination, and that consequently the clerk at the commencement of his articles (for want of that advice and assistance which such an institution might afford) has to struggle with so many difficulties that he too frequently abandons himself to despair of ever acquiring a sound and comprehensive knowledge of his profession, and aims solely at getting up sufficient knowledge to enable him to pass—knowledge acquired merely for the occasion, and which, not being engrafted firmly in his mind, and made, as it were, a part of himself, is more

speedily lost than attained ; or, as is frequently the case, he fails, not owing so much to his want of inclination or ability, as of that assistance and stimulus which the generality of youth so much require. We would also request your Lordships' attention to the fact, that although amongst articled clerks are to be found youths at least equal in ability to those of any other profession, and although their number is so great, yet few ever attain to eminence or distinction in their profession, caused, as we would humbly submit to your Lordships, by the absence of an institution such as we now propose. Another consequence is, that the profession and the public are much exposed to the malpractices of artful and designing men, who, having but a superficial acquaintance with the law, make it an instrument of oppression. Thus the public are injured, and the profession disgraced. The remedy, we humbly suggest, is to be found in the establishment of an institution which will raise the qualified practitioners above the attacks of these individuals, and draw so wide a line of demarcation in respect to character and competency between the two classes, that none in entrusting the care of their fortunes and interests need ever err.

We have viewed with great interest the late proceedings of the benchers of the Middle Temple on behalf of candidates for the Bar, and we humbly think that the time is now arrived when the articled clerks should put forth *their* claims to the consideration and assistance of the attorneys, and other members of the legal profession, upon the subject of education. The present appears, for this reason, to be a very happy crisis, and if we delay urging this subject *now*, we shall suffer such an opportunity to pass unimproved as may not occur again for many years.

The character of the society will not, of course, be collegiate, but institutional. It is intended to be a valuable auxiliary to the office or chambers ; and whilst at the institution the theory and principles of the law are principally learned, the practice at the office or chambers will be rendered more interesting and instructive. It is hoped that theory and practice will be thus happily combined ; and that whilst the institution may be as a study, the practice at the office may bear the same relation to the lawyer as the experiments of the laboratory to the chemist.

We have not at present entered minutely into the detail of our scheme, further than was necessary to satisfy ourselves and to convince your Lordships of its importance and practicability ; and we have thought that, as so much would depend upon the *sanction* of your lordships to the *principle* of the measure, it would be better

to apply for that in the first instance. Your Lordships will already have collected the general character of the proposed institution; but we would more particularly state, that the specific objects which we have at present contemplated are,—the formation of an institution where suitable lectures would be delivered; the formation of a library—and we would here state to your Lordships that there is not a public law library in London accessible to the *general* body of articulated clerks; also the formation of classes, under competent tutors and professors, for private instruction; the institution of periodical examinations, and the award of prizes, honours, and distinctions, to those who most distinguish themselves. Another object would be (as before stated) *protective*; namely, for the general conservation of the political and social interests of the articulated clerks, as occasion might hereafter be found to arise. Although the majority of those undersigned have but a short time to serve under articles, and are therefore unlikely to reap any of the proposed advantages; yet we are so fully convinced that the scheme we have suggested would effect a more important reform in our department of the Profession than has ever yet taken place, that we have resolved to devote our time and energies towards the accomplishment of our object; and we very earnestly and respectfully solicit your Lordships to take the subject into your consideration, and kindly to give your sanction to its principle, which we feel no doubt would insure to us abundant success. We fear that the importance and number of your Lordships' engagements will prevent your Lordships from giving us advice or directions in aid of our proceedings; but it is needless to say with how much respect and gratitude any such suggestions would be received by us.

In conclusion, we would state to your Lordships that we represent a very numerous body of articulated clerks, equally desirous with ourselves for success. With great respect, we have the honour to remain your Lordships' most obedient, humble servants,

W. W. WILSON,
EDW. TURNER PAYNE,
GEO. MARSLAND, JUN.
S. SANSON,
T. COOKE.

London, 13th March, 1846.

Copies of the above letter were forwarded to each of the above noble and learned lords, and the following answers have been received from their Lordships' respective secretaries:—

(Copy.)

" George Street, 28th April, 1846.

GENTLEMEN,—I am directed by the Lord Chancellor to acknowledge the receipt of your letter to his Lordship, and to state, with reference to the scheme proposed in it, that the Lord Chancellor's engagements prevent his entering into the details of the scheme, or offering any suggestions respecting them; but that, so far as he has had time to examine it, there does not appear any objection to the plan proposed for increasing the professional knowledge of the members of the intended society. I have the honour to be, Gentlemen, your very obedient servant,

H. J. PERRY.

(Copy.)

SIR,—On receiving your letter of the 8th inst. I laid it before the Master of the Rolls, and his Lordship directed me to offer the following observations in reply:—

His Lordship is satisfied that much may be done to encourage and promote the instruction and education of articled clerks, and it would give him very great satisfaction to hear of a well-considered and practicable plan being established for that purpose; but he thinks that such a plan cannot be formed and carried into execution without the advice and assistance of experienced attorneys and solicitors, who may be able to direct attention to the most advantageous course of study, and concur in the application of the time which may be required for pursuing it. I am, Sir, your very obedient servant,

G. W. SANDERS.

Rolls, 15th April, 1846.

We have thought it right to put these letters on record, although we can ill spare the space. So far as they go, they bear out our opinion that the new generation of lawyers is not indisposed to wise and judicious reforms in the law. We would, however, with the kindest feelings to the gentlemen who have made this communication, and with the wish, and, it may be the power, to serve them, recommend them to follow the advice of Lord Langdale. Let them take the opinion, and rely on the co-operation of experienced members of their own branch of the profession. There will, we think, be no indisposition to attend to their reasonable wants and wishes. We can truly say that, in endeavouring to assert the principle of an extensive reform of the law, we have been cheered on and

supported as warmly, readily, and effectually by solicitors as by barristers, and that great help and many of the most valuable suggestions have come from the former class. We trust, then, that our young friends will rely for advice on the senior solicitors. Let them state their case in the proper quarter, and we believe they will not be disappointed. If, however, having first tried to obtain the accomplishment of their wishes by these means, they fail altogether, or are unreasonably delayed, we will most readily assist them in obtaining their rights.¹

ART. IX. — TOWNSEND'S EMINENT JUDGES.

The Lives of Twelve eminent Judges of the last and present Century. By WILLIAM C. TOWNSEND, Esq., M.A., Recorder of Macclesfield. 2 vols. 8vo. pp. 1012. London, Longman, 1846.

THIS is a very entertaining, and also a useful work. It comes before us with no pretensions, but it contains the lives of some of the most eminent judges who have adorned the bench for the last half century, and somewhat more — Buller, Kenyon, Alvanley, Loughborough, Gibbs, Ellenborough, Erskine, Redesdale, Grant, Tenterden, Stowell, and Eldon. The volumes probably owe their origin in their present form to the work of Lord Campbell; and if Mr. Townsend adds the Lives of Common Law Judges belonging to former periods of our judicial history, the book will form an agreeable companion to his lordship's work.

Our author appears to have bestowed considerable pains in collecting his materials from all the sources of information already open to the public, and from some private ones to which he has had access. He has used his materials ably; and

¹ As this sheet is passing through the press we have had an opportunity of perusing the evidence which has been taken before the select committee (H. C.) of the present session on Legal Education. It is of much interest, and we shall, when the whole is printed, draw our readers' attention to it. At present we will only observe that much of the evidence points to a very extensive scheme of Legal Education.

while the style of his narrative and of his remarks is free from all affectation and all taste in other respects vicious, it does not suffer his reader's attention to flag. He presents us with many lively, and, generally speaking, many correct likenesses of the eminent persons whom he pourtrays. His pages abound with anecdotes curious and striking; they have the higher merit of bringing together much information upon legal history which lies scattered elsewhere, and they give the particulars of many cases and trials in ample detail, wherever a full knowledge of those facts is necessary for understanding accurately the part borne in the forensic scene by the great actors, whether at the bar or upon the bench, whose story he records.

Where there is so much to commend, we can with difficulty pitch upon the most excellent portions. But we think the lives of Buller, of Redesdale, of Tenterden, are the best. Of the three, the last appears to us to stand at the head. Perhaps we should add, that Lord Eldon's life possesses less merit than any of the others. But, indeed, if we consider how full and interesting a biography of that eminent person has lately been given by Mr. Twiss, it may be deemed superfluous to have inserted one in the present collection, and its place might have been better supplied by Lord Mansfield, or Mr. Justice Holroyd.

In order to enable our readers to judge of the work themselves, we shall now make some extracts from the *Life of Judge Buller*, which may not be uninteresting to our younger friends.

“Francis Buller was the second son of James Buller, of Spillington, Esquire, one of the members for Cornwall, by his second wife Jane, a daughter of Allan, Lord Bathurst, and was born at his father's seat, in 1746. The family, from its antiquity and alliances, had long been eminent among the ancient aristocracy of Devon and Cornwall. Notwithstanding the incredulity of country gentlemen, some lawyers have pedigrees. The portrait of an ancestor in his judicial robes hung by the bed-side of the room in which he was born, and may have given the first chance impulse to his childish aspirations. He was placed in a private school in the west of England; and then, instead of being removed to the University, was transferred, as a younger son, to an attorney's office. He was determined to make himself thoroughly master of

his profession, and, like a good artificer, in the words of Lord Bacon, did not dread "the smoke and tarnish of the furnace." On the 8th of February 1763, he was matriculated at the Inner Temple, and became a pupil of Mr. Ashurst, a celebrated special pleader, with whom he afterwards sat as colleague for many years upon the bench. The advantages to a pupil of a special pleader's chambers depend almost exclusively upon himself. The great majority may be characterised as west-end, or drawing-room, pupils, and pay their hundred guineas, read the newspapers, discuss the topics of the day, copy a stray opinion, transcribe a declaration on a bill of exchange, make up a rubber at billiards, and exeunt. By students of this class was Buller tempted, but had too much firmness to yield to their temptations. In mature life, when in the company of a youth of sixteen, he cautioned him against being led astray by the examples or persuasion of others, and said, looking back with pardonable complacency to his own fortitude, "If I had listened to the advice of some of those who called themselves my friends when I was young, instead of being a judge of the Court of King's Bench, I should have died long ago a prisoner in the King's Bench." In the language of self-gratulating authority, he could repeat to a beginner the classical caution,

Qui studet optatam cursu contingere metam,
Multa tulit fecitque puer.

The first to enter, and the last to quit chambers, eager to unravel the mysteries of a subtle science, and delighted with its logical finesse, he soon proved himself a useful, and of course favourite pupil. At the expiration of two years he took out a certificate as special pleader, and being warmly recommended by his late tutor, he was soon fortunate enough, notwithstanding his extreme youth, to acquire a large practice and many pupils, but was not called to the bar till Easter Term, 1772. Precocious throughout, the future boy judge married, when only seventeen, Susannah, daughter and heiress of Francis Yarde, Esq., of Churston Ferrers, and St. Mary, Ottery, Devon. An only son, Francis, the second baronet, was the fruit of this marriage. The instant success in his profession of the juvenile bridegroom proved that he had not adventured on wedlock rashly. In a work, entitled "*Strictures on the Lives of Lawyers*," and written by a shrewd observer, it is asserted, that his accession to business was immediate, and his practice as a barrister considerable from the first. In term business he had no equal, and in every motion of consequence or special argument he was always engaged, and at home. Very early in life he seemed to have entered into a recognisance to think and talk of nothing

but law, to make himself the Sulpitius or Coke of his age. His astonishing success introduced the custom of making special pleading an introduction to the profession. It had hitherto been the fashion for students to saunter through the courts, and to catch any stray fragment of legal law amid the intervals of gossip; a plan of desultory study still much in vogue with our professional friends on the other side the channel. "For the talents of an advocate," says Espinasse¹, "and legal acquirements, Buller soon ranked among the first of his day. To show the extent of his practice at the bar, it is only necessary to refer to Cowper's Reports, where there will be found few cases of any importance, in which his name does not appear; and his arguments were equally distinguished for research, ingenuity, and sound law." It has been asserted, indeed, probably with truth, that he was more successful in his addresses to the bench than to jurors; he was unfortunate in his speeches to the passions, and could not make a forcible appeal to the feelings and the heart. However shrewdly he cross-examined, however pertinently he pointed his remarks, with whatever dexterity he managed the details of his case, there was still wanting the happy art, by which a skilful counsel identifies himself with his client, makes others feel by appearing to feel himself, with playful sarcasm laughs a case out of court, or in the storm and tempest of his passion hurries along the twelve honest men in the box, and compels their verdict in his favour. But though Buller could not vie with such a leader at *Nisi Prius* as Dunning, who played with his audience as on a musical instrument, he was superior to the Wallaces and Lees of his day; and appears, during his short continuance at the bar, to have been retained in all the trials of interest which amused that frivolous age. Among these may be instanced the trial of the Duchess of Kingston, the action for libel against the Rev. J. Horne, the trial of Jack the Painter, the extraordinary case of the Chevalier D'Eon, "*Vir, nunc fœmina, Cæneus*," and trial of Dr. Dodd. It may be mentioned, as a curious proof of the inefficacy of even capital punishments to deter from crime, that the foreman of the jury, who was most eager to convict Mr. Buller's unfortunate client, and to overrule the more compassionate feelings of his brother jurors, should himself have been tried subsequently before Mr. Justice Buller for forgery, and, meeting with the same rigid justice he had before exacted, have been convicted.

At an early period of his professional life, Mr. Buller gave to the world, in his own name, the first treatise ever published on

¹ Author of "*My Contemporaries*," in *Fraser's Magazine*.

the law of *Nisi Prius* ; it long continued, as the compiler intended it should be, a favourite *vade mecum* on circuit ; and, being published at a time when good treatises were rare, could not fail to enhance highly the legal reputation of the author. Though without much pretension to literary elegance and style, definitions are there given with clear, logical precision ; decisions are noted down with accurate brevity, and an exact method assists, while it never perplexes the learner. It was not affected to be denied, that the work had been compiled from a collection of cases made by Mr. Justice (afterwards Lord) Bathurst, for his own use, and that he had given the manuscript to his kinsman to assist him in his studies. They, however, who remember the jejune and feeble talents of Lord Bathurst, may well believe that the treatise when it passed from his hand was a mere shell or skeleton ; that it required Buller's plastic and vigorous arm to endue it with sinews, and flesh, and muscle. The jealous rivals, indeed, whom he had outstripped in his profession, affected to represent the publication as a disingenuous attempt to raise a spurious fame, by assuming the title of author of a book which was the work of another. Mr. Buller never condescended to notice the calumny, which was, in the pithy language of Lord Mansfield, too impotent to be contradicted. From the first, the talents of the young lawyer had attracted the notice of the venerable judge ; he had admired his perspicuous and inductive reasoning, his clear method, that perfection of forensic oratory which says no more than just the thing it ought, his copious reading, and the nice acumen with which he could distinguish between apparently conflicting decisions, and search out the true principles of the law. His argument for the plaintiff in error, in the important case of *Fabrigas v. Mostyn*, delivered the year after his call to the bar, elicited the hearty applause of Lord Mansfield, who said, emphatically, — and praise had a double charm coming from his lips, — “ It has been extremely well argued.” The father of the King's Bench was aware that his health and strength would be shortly on the wane, and anxiously sought a colleague on whom he could rely as another self, to whose more youthful vigour he might delegate a portion of his duties when they should become onerous, and on whose judgment he might lean with confidence in all cases of difficulty and doubt. Accordingly, on the death of Sir Richard Aston, which occurred in Hilary Term, 1778, Lord Mansfield strongly recommended Mr. Buller as his successor, and the Chancellor lost no time in offering the vacant judgeship to a young man, then only thirty two years of age, — an instance, we believe, without parallel in the modern judicial annals of our country. His appointment formed an ex-

cellent contrast to the too prevalent custom of selecting for judges aged lawyers, whose duties had been done, at a time of life when they were only fitted for retreat; a precedent which the Chancellor Eldon might well have followed, instead of lifting up such decayed veterans of seventy, as Mr. Justice Burroughs and Chief Baron Alexander, to the Bench. In a pecuniary point of view the offer presented no attraction, the income of a puisné judge of the King's Bench being then only two thousand two hundred a year, a sum scarcely the fourth of what a counsel in leading practice might expect to realise. Mr. Buller had already received a silk gown, had been appointed second judge on the Chester circuit, and stood at the vestibule of all the public offices leading to distinction. But the proposal comprehended still a great charm to an ambitious and weary man; his constitution, naturally weak, had threatened to give way under those hard task-masters, the daily toils of his profession; and he sighed for the comparative repose of the bench. His hopes, too, were flattered with the promise, that his illustrious patron would, on retiring, exert all his influence in his favour; and that, being associated with him a few years, on his shoulders might descend the mantle which had been worn by the legal seer." Vol. i. pp. 2—6.

We have thus traced his career to the Bench. How long and usefully he presided in the first Criminal Court of the country is well known to all. We shall see, however, that even this eminent situation is not without its disappointments: —

"In the summer Lord Mansfield resigned, and "a change came o'er the spirit of his dream." The wishes of the venerable peer, to secure which he had exerted all those arts of diplomacy for which he had in earlier life been so famous, — the general hopes of the profession, who contrasted the courteous bearing of Buller with the rough deportment of his rival, — his own high claim, from having performed unfeigned so long and so ably the arduous duties of the office, — were all alike disregarded. The prime minister, Mr. Pitt, was one who scarcely ever rewarded any but political services; and even in his judicial appointments had respect to previous merits in Saint Stephen's Chapel. To Buller, except in the remembrance of a few courtesies which that learned judge had shown him on his first Western circuit, he was almost wholly unknown; but Sir Lloyd Kenyon, an honest and admirable lawyer, had served him faithfully through several political campaigns, and had fought his battles, in advocating the Westminster scrutiny, one of the most unwise and unpopular acts, during his long admi-

nistration. Another and more weighty reason for Mr. Pitt's refusal has been ascribed to the impropriety, of which himself had been an eye-witness on the Western circuit, of Mr. Justice Buller trying a Quo warranto affecting political rights in a close borough, of which his own family had notoriously the property. In the repugnance produced by this unguarded and improper act Lord Thurlow shared, saying, in his own rough disparaging way, "I hesitated long between the corruption of Buller and the intemperance of Kenyon." In fact Mr. Pitt, with characteristic hauteur, controlled the choice of the Chancellor; and, notwithstanding his curses, muttered loud and deep, insisted on bestowing the second vacant prize, the Mastership of the Rolls, on another staunch political friend, Sir Pepper Arden. The sole reward which Buller got for his valuable labours was the promise of a baronetcy, to which rank he was elevated in the following year. That he felt the disappointment keenly could have afforded no surprise; it was not confined to himself—a general feeling of regret was excited among the whole of the King's Bench bar, in whose estimation he stood so very high, not merely for the extent of his legal knowledge, but for his conduct towards them on the bench, and for his general urbanity as a judge. They had no flattering anticipation of courtesy from Lord Kenyon, such as they had been in the habit of receiving from Mr. Justice Buller, and they found their apprehensions not without foundation. Disappointment, however, did not induce the learned judge to resign, or immediately to change his seat to another court. "He resumed his place in the King's Bench, but with evident chagrin and dissatisfaction, which the temper and manners of the new chief justice were but little calculated to remove, or to reconcile him to that change of situation which his appointment had occasioned. Too able a lawyer to require the assistance of others to enable him to form an opinion, and too proud to ask it, Lord Kenyon rarely condescended to consult the other judges, or inquire their judgment. He did not wait for their expression of approval or dissent, but made rules absolute or discharged them on his own discretion only."¹ On arguments he pronounced an unhesitating opinion, and left the other judges to agree with him, or differ from him, as they thought fit; the latter was of unusual occurrence, though Mr. Justice Buller sometimes astonished the surly chief, by explicitly dissenting and assigning very cogent reasons for his dissent. A similar slight was noticed with shrill displeasure by Mr. Justice Willes

¹ Espinasse.

in Lord Mansfield's time ; but judicial fame did not attach to his interruption the same weight as that which attended the grave rebuke of Buller and his dignified expression of a contrary opinion. " 'I have not been consulted, and I will be heard ! ' exclaimed one of Lord Mansfield's puisnés once. At this distance of time," continues Jeremy Bentham, "five-and-thirty or forty years, the feminine scream issuing out of a manly frame still tingles in my ears."

To descend to the low and level consequence of his brethren, who had been used to look up to him, was ill suited to the high mind of Buller ; he had been the president of a liberal republic, he was now the vassal of an absolute monarchy. His opinions had swayed implicitly the judicial minds of his brethren ; they were now exposed to the angry bay of Kenyon, and the snappish yelp of Grose. He bore the change for many years, and till enfeebled by disease, when, forsaking the court in which he had practised all his youth and manhood, he retired from the King's Bench into the Court of Common Pleas, and became a puisné judge of that court in 1794. Vol. i. pp.9—11.

We shall now extract at random some of Mr. Townsend's anecdotes, which are told in an amusing and lively manner. Lord Kenyon's life affords a comforting lesson for silent juniors :—

"He had no professional connexion in London, and disdained to stoop to those petty artifices, by which, in the absence of interest, a business may be sometimes forced. Though year after year passed away without introducing more than an occasional client to his chambers, he studied as hard as if he had seen the large fees in present, and the judgeship in distant, perspective, which at length so amply rewarded his labours. One line—a line fraught with instruction—includes the secret of his final success,—he was prudent, he was patient, and he persevered. The spirit of despondency had indeed at one time almost mastered his dogged determination : after ten years' diligent, but apparently vain, pursuit, he would gladly have quitted his profession and have taken orders, if he could have obtained the small living of Hanmer in his native parish. Never let the mature but desponding lawyer forget that had Scott consulted his own sinking inclinations, he would have been a provincial barrister at Newcastle-upon-Tyne, instead of Lord Chancellor ; that had Kenyon yielded to temporary depressions he would have been a Welsh parson, and not Chief

Justice of England The line of demarcation appears to have been less broadly drawn at that period than it has been since between the common law and equity courts, and our indefatigable lawyer alternated between the two, but paid the more especial attention to the Court of Chancery. Without confining himself strictly to what is called chamber practice, he made conveyancing and drawing bills in equity his peculiar study; acquiring by slow but sure degrees, "*sensim sine sensu*," a reputation with the profession of being a sound lawyer, a neat and safe draftsman. In compliance with a custom, which has prevailed even so late as the days of Romilly, he went the Oxford circuit, and attended sessions at Stafford and Shrewsbury for ten years, a listener to the good things of other men rather than utterer of his own; silent as a learner where he might have taught; being there drilled, however, into that intimate and peculiar acquaintance with the fourth volume of Burn's Justice, which astonished the Court of King's Bench so much on crown-paper days, when displayed by an equity lawyer. This universal erudition,—the acquisition of so many distinct branches of professional knowledge now rarely sought for, unless hurriedly and on the surface by provincial barristers,—forms an important feature in his legal character. Others have been distinguished for their science in particular departments; some as real property lawyers, some as black-letter lawyers, some for their profound acquaintance with crown law, but the labour of Mr. Kenyon comprehended them all. It now and then happened that, sitting in the back rows, he could suggest, as *amicus curiæ*, some clause in a forgotten act of parliament which had escaped notice; and though Mr. Thurlow, the then Attorney-General, declared with an oath, that he did not pretend to carry the statute-book in his head, he saw the great advantage of gaining so useful and pains-taking an auxiliary, and made such favourable overtures to the learned stranger, that from this period he shared with Hargrave the toil and profit of being the lion's provider. It is an encouraging truth to those who feel dispirited from failure at the commencement of their career, that however much the exact time of accession to business may depend on opportunity and chance, sound legal knowledge will command success, and that the reputation of a real lawyer must eventually prevail over adverse fortune and neglect. Several of Lord Kenyon's most distinguished colleagues had to struggle at starting with similar discouragements. Thurlow wasted in taverns the evenings for which the profession had no call; Grant bore a musket in Canada to relieve his vacant hours; and Scott travelled his Northern circuit in the hopeless

security of undisturbed leisure. But they neither gave way to despair nor carelessness, steadily pursuing their course through the flickering shadows of doubt and gloom, and to the clouded dawn of each a bright day succeeded. Vol. i. 39, 40.

And yet that Lord Kenyon had none of the graces of the profession, is made out very amusingly. We can only give two instances : —

“The Term Reports, when they use the very language of the chief, often contain a series of broken metaphors. For example : — “If an individual can *break down* any of those safeguards, which the constitution has so wisely and so cautiously erected, by *poisoning* the minds of the jury at a time when they are called upon to decide, he will *stab* the administration of justice in its most vital parts.” P. 79.

Coleridge in his Table Talk has mentioned another of his favourite examples, which displays a felicitous ignorance that the whole race of Malaprops might have envied. “Above all, gentlemen, need I name to you the emperor Julian, who was so celebrated for the practice of every Christian virtue, that he was called Julian the Apostle?” P. 80.

Lord Alvanley is made thus to import his own experience in horseflesh into a horse cause : —

“Some years ago an action was brought against a gentleman at the bar respecting a horse which he had bought to go the circuit. The horse was taken home, and he mounted him to show his paces : the animal would not stir a step : he tried to turn him round ; but he was determined not to go the circuit. The horse-dealer was informed of the animal's obstinacy, and asked by the purchaser how he came to sell him such a horse. ‘Well,’ said the dealer, ‘it can't be helped ; give me back the horse, allow me five pounds, and settle the matter.’ The barrister refused, and advised him to send the animal to be broken by a rough-rider. ‘Rough-rider!’ said the dealer, ‘he has been to rough-riders enough already.’ ‘How came you to sell me a horse that would not go?’ rejoined the lawyer. ‘I sold you one warranted sound, — and sound he is,’ concluded the dealer ; ‘but as to his going, I never thought he would go, and never said he would.’” Vol. i. 131.

Another anecdote of a horse cause before a different judge : —

The same honest inflexibility of purpose which would not brook suspicion, marked the conduct of the Chief Justice in the trial of a horse cause, to which a certain privy councillor was party. The right honourable baronet took his seat as of right on the bench, and ventured in the course of the trial to whisper a remark to his lordship. "If you again address me, Sir William," was the grave rebuke, not delivered in a whisper, "I shall place you in custody of the marshal." The spirit of the man of rank died within him before the stern voice of the judicial dictator, and he shortly stole away from the side cushions of the bench. The instant submission paid by all ranks to the authority of a chief who ruled the court and its precincts with despotic sway, "*cuncta supercilio moventis*," is said to have been once exhibited in a very ludicrous manner. A storm of wind and rain had driven a regiment of Westminster volunteers to seek for shelter in the hall, when his attention was attracted by the clatter of the musketry. "What is the cause of that interruption, usher?" vehemently demanded Lord Ellenborough. "My *Lud*, it is a volunteer regiment *exorcising*, your *Ludship*." — "Exorcising! we will see who is best at that. Go, sir, and inform the regiment, that if it depart not instantly I shall commit it to the custody of the tipstaff." The battalion filed off, we are assured, at the first report, with unmilitary speed. Vol. i. 365.

We have endeavoured to show the value of this useful work. It is fit that we now undertake the less grateful but equally necessary task of stating its defects. These bear, it is true, no proportion to its merits, and they are such as a little attention might have avoided, and a moderate care may easily correct. But we allude to the carelessness and inaccuracy with which many particular facts are stated. This is unfortunate, because it detracts from the usefulness of the book by lessening the confidence in its authority. We hold it a duty to point these errors out — premising that it would be most unfair to conclude that there exist others not enumerated; for our catalogue, though it will necessarily extend to a considerable length, contains nearly the whole that a very careful perusal has enabled us to detect.

It is rather an omission than an error to suppress the fact, not probably known to the author, that when four thousand pounds were recovered in the case of *Lambert v. Tattersall* — for a foul libel in the newspaper upon an accomplished

and virtuous young lady of high rank, charging her with having eloped with a footman, the ample damages were paid by the real author of the slander, afterwards Prince Regent of this kingdom. Vol i. p. 70.

In like manner (p. 81.), when giving examples of Lord Kenyon's occasional felicity of diction, Mr. Townsend ought to have noticed his mentioning the style of auctioneers in their puffs, as "the penmanship of those persons."

It is wholly untrue — indeed, impossible — that Arden, afterwards Lord Alvanley, owed his silk gown, in 1780, to the patronage of Mr. Pitt, (vol. i. p. 134.), for at that time the latter had no possible influence with either Lord Thurlow or any other person in office. A like inattention to dates makes our author enumerate Mr. Fox with Burke among the eminent men who had just "risen above the political horizon" (vol. i. 174.), in 1761, when Wedderburn first came into Parliament. Fox was at that time barely twelve years of age, having been born in 1749. (i. 174.)

In vol. i. 141., we find the *Rolliad* cited as to Lord Alvanley — "the tallest fittest man to go before the King." But that line could have no application to any but a household officer; accordingly it is Lord Salisbury that it was intended to describe.

In vol. i. 173., he calls Mr. Stuart the appellant in the Douglas cause, when giving Wedderburn's letter to that gentleman upon the subject of the decision, Mr. Douglas was the appellant; Mr. Stuart was only the solicitor.

It is an entire mistake to suppose (i. 218.) that Lord Loughborough was induced by George III.'s desire to take the villa of Baylis, near Windsor, and that he received many or any marks of kindness from the Royal Family when living there. The neglect which he experienced was well known, and was matter of complaint in the ex-chancellor's family. He had not an audience the morning of his death, nor at any other time. He died of gout in the stomach, not of apoplexy. Nor was it possible that in those days of slow travelling he could have gone from Windsor to Bulstrode after seeing the King, and return to Baylis the same day. (i. 218.)

It is equally incorrect to say (i. 232.) that Wedderburn

obtained a pension for Dr. Johnson, when eating his way to the Bar. He was called to the Bar in 1757 (i. 170.), and Johnson's pension was not obtained till 1763, when Wedderburn was in Parliament, and a rising man at the Bar.

The praise bestowed on Sir W. Follett is exaggerated, and therefore hurtful to its object. After mentioning Camden, Buller, Dunning, nay, Glanvil, Bracton, and Littleton himself, Mr. Townsend says, "a still more illustrious forensic name — greater than the greatest of them all, was Sir W. Follett." (i. 238.)

In the Life of Gibbs, he mentions Damberger's travels, as pretending to have been "in Central Spain," instead of Africa. (i. 296.)

In speaking of Lord Ellenborough, we find two great mistakes on one page. (i. 301.) He is mentioned as having a Northumbrian burr instead of a Cumberland accent, and his father, the Bishop, is said to have been the author of the "Serious Call," which was written by William Law, a clergyman, employed as tutor in the family of the historian Gibbon's father.

In some, but only few instances, the point of the remarks and sayings in anecdotes is lost. Thus the well-known story of Paley's answer to Bishop Barrington, who introduced his wife to the Archdeacon, saying, "we have lived five and thirty years together without a single word of difference," is in two respects misrepresented. He is made to say, "Verra flat," which is a Scotch, and not a Cumberland pronunciation — the Cumberland would be "Vara." But the real phrase was, "Rather flat, my Lord, eh!" and that is much better. (i. 307.)

In the same Life of Lord Ellenborough, a sarcasm is given to that learned Judge, which was Chief Justice Downes's. (i. 353.) Sir Frederick Flood, in mitigation of punishment, began: "My Lords, my unfortunate client," and repeating the phrase through hesitation, the Chief Justice said, "Proceed, Sir Frederick, thus far the Court is with you." In the same page, Mr. Brougham's well-known attack on the prosecuting Counsel and the Court respecting a libeller, is misquoted, leaving out the main part of the passage, and it is made wholly unintelligible, by being said to have occurred in

Hunt's case, for a political libel, to which it could have no application, whereas it was in Houston's case, that of an infidel book. "It is not to those only (Mr. Townsend quotes) who clamour out (it was, who proclaim pharisaically) their faith in high places that credit will be given for the sincerity of their professions." But the rest of the passage is omitted — "A man may be sincere though tranquil, devout though charitable; and may even reckon upon profiting by his religion in the way of reversion, although he should abandon the hope of a present advantage from it, and refuse to make his godliness a great gain." We have applied to Lord Brougham for a statement of the very words, and have been favoured by his Lordship with the above note of the passage.

It is another error in the same Life, that among Lord Ellenborough's sons, is mentioned W. J. Law, Insolvent Commissioner. He is the son of Ewan Law, Lord Ellenborough's brother. (i. 393.)

We observe in several parts of this book reference made to a work, called "the Clubs of London." In one place (i. 405.) the name of Adair is given as that of the author. We believe it was Mr. Marsh's work, a gentleman formerly at the Indian bar, and originally of the Norfolk Circuit. But, in truth, no use should ever be made of so indefensible a publication; it is a sin against all the rules of society, for it professes to give in print the anecdotes and the conversations of private circles, from which the public are carefully and properly excluded, and nothing but a gross breach of faith could lead to such publicity.

Nothing can be more inaccurate, indeed more impossible than the statement in vol. i. p. 422., that after Erskine became aware of his strength, that is, in the fourth year after he was called to the bar, he "altogether refused to accept junior briefs at Nisi Prius." Surely Mr. Townsend must be aware, in the first place, that no man at the bar ever can refuse a brief, still less refuse it merely because another, his senior, is to lead in the same cause, and next, that no business is more agreeable than that of a second counsel exempt from the drudgery of the pleader, and relieved from the responsibility and the cares of the leader.

In the same Life, p. 426., we have the well-known epigram of C. Warren on Judge Grose ascribed to Erskine,

who could no more have written those excellent Latin verses than Warren, or the Judge himself, could have made the defence for Stockdale.

"Qualis sit Grotius iudex uno accipe versu ;
Exclamat, stridet, dubitat, balbutit et — errat."

He also transposes *dubitat* and *stridet* unhappily. In compensation of this, he omits among the many indifferent *jeux d'esprit* of Erskine, by far his happiest although certainly indecorous riddle on George III.

"I never can die, though I may not live long ;
I may never be right, though I cannot do wrong ;
My jowl it is purple, my head it is fat —
Come riddle my riddle. What is it ? What ? What ?"

The reader of the last generation needs not to be reminded of what those of to-day will require to be told, that George the Third's constant turn of conversation was the interrogatory with which the last line concludes.

In vol. i. p. 443., we find Croke called a reporter "in the reign of James I. and Charles I.," he having begun, as it is well known, with Elizabeth.

In the second volume we have found but very few inaccuracies — and those of little moment. At p. 195., the late Richard Sharp is called "that old stager, Granville Sharp," and in p. 220., it is mentioned as a characteristic of Lord Eldon that not only was he addicted to doubts, but also to distrusting his own first impressions. Nothing can be more groundless. All his doubts and hesitation commenced when he came to pronounce his judgment. They who best knew him, and had most narrowly observed his habits, asserted uniformly that he made up his mind the moment he had applied it to the question, and never changed his opinion, how slow soever he might be to give it out. This was the constant statement of Sir Samuel Romilly, than whom no one better knew him. Indeed, Mr. Townsend subsequently quotes his opinion to this effect. (ii. 416.)

It must be a great error which we find in p. 305., of the same volume, that Sir W. Scott gained 1000*l.* by each of the prizes taken while he was King's Advocate — a tenth part of the sum would certainly be much nearer the truth.

We must again remind the reader that we have here set down all the errors of the least moment which we find in these volumes, and that they do not materially impair the value of the work either for amusement or instruction. We have pointed them out at length merely in the discharge of our critical duty.

ART. X.—CONVEYANCING BURDENS ON LAND.

1. *Report from the Select Committee of the House of Lords on the Burdens affecting Real Property, together with the Minutes of Evidence taken before the said Committee.* 1846.
2. *Copy of a Communication made by Lord Monteagle to the Board of Trade, on the subject of Burdens on Land.* (Ordered by the House of Commons to be printed, June 29. 1846.)
3. *A Letter to Lord Worsley on the Burdens affecting Real Property.* By Henry Sewell, Esq. London, 1846.

WE conceive that it is now certain that a great change is about to take place as to the law and practice relating to the transfer of property; and however we may congratulate ourselves on the speedy consummation of our wishes and hopes in this respect, it is important that its true cause should be properly ascertained. If we have from the first ventured to assert (at the great risk of heartily tiring our readers with the subject), that a great Reform in Conveyancing was absolutely necessary, it is now obvious that the conviction produced in our minds was not more strong than the occasion warranted, and was much more generally diffused than we had imagined. No sooner is the opportunity given than outbursts a most general, if not universal, expression of opinion on the subject. Our task then, on the present occasion, is an easy one. It is simply to produce the evidence which we think warrants these strong assertions, and they are chiefly to be found collected in the important documents which we have placed at the head of this article — the Report of the Select Committee on the Burdens of Land, and the evidence

to that Report. When we use the word Report, we should more properly say Reports; because the Report drawn up by Lord Monteagle, to the extent of the recommendations contained in it to which we are about to refer, was substantially adopted by the Committee. This latter document is now a public one, having been communicated to the Board of Trade, and subsequently printed by order of the House of Commons.

Let us then state the general recommendations of this Committee in this Report.

This is the first:—

“The improvement of the law of Real Property, the simplification of Titles and of the forms of Conveyance, the establishment of some effective system for the Registration of Deeds.” The first recommendation of the counter Report of Lord Monteagle is in similar words, with this addition as to registration — “thus applying principles already adopted in Scotland, Ireland, and almost throughout the Continent of Europe, whereby the security to landed property has been increased, and its value augmented, several years’ purchase.”

Thus we have recommended by all parties in the House of Lords, specifically, 1. The simplification of Titles; 2. The simplification of Forms of Conveyance; 3. The establishment of an effective Registry of Deeds. We should also notice that, at a public meeting called by the Society for amending the Law, on the 6th of June last, the following resolution was moved by the Marquis of Clanricarde (now a cabinet minister), seconded by Lord Beaumont (the chairman of the Committee on the Burdens of Land), and carried unanimously—“That the transfer of Real Property is greatly impeded by the existing system of conveyancing, and that the market-value of land is thus kept down below its just price.”

Having first adverted to the unequal pressure of the stamp-duties, the Report goes on:

“The transfer moreover of real property is subjected by law to other difficulties, expenses, and irregularities of a similar character. The Committee are convinced that the marketable value of real property is seriously diminished by the tedious and expensive process attending its transfer. Nor is it only in the transfer of

real property that the pressure of this burden is felt. It is a work of time to raise money on landed security, and the law expenses incident to the transaction are a considerable addition to the interest on the sum borrowed. The transfer of the debt or mortgage is also attended with serious expense to the mortgagor; the process of discharging the land from one loan and subjecting it to another being both heavy burdens upon the proprietor." (p. viii.)

And after enumerating other charges which are considered as special burdens on land, the Committee state that they are—

"Anxious to impress on the House the necessity of a thorough revision of the whole subject of conveyancing, and the disuse of the present prolix, expensive, and vexatious system." (p. xiii.)

Lord Monteagle, as representing the minority of the Committee, may be said on this point "to follow on the same side."—

"The expense of searches, of making out title, and transferring legal property is shown not only to be grievous in its amount, but partial and unjust in its pressure on small properties. Being also uncertain and incapable of any previous estimate, it involves every purchaser or seller in an undefined obligation. It also affects the credit of the landowner by rendering the mortgage as well as the sale of lands difficult and ruinous. This affects the selling value of the lands, more especially as it excludes from the market the smaller and therefore the more numerous purchasers."

And after adverting to some of the evidence which we shall hereafter notice, and mentioning with much praise some of the recent conveyancing acts—

"The Committee rely with confidence that the greatest relief will finally be obtained for the owner of real property, by a determined perseverance in this course of sound legislation." (p. 40.)

It will be admitted then that this Committee has expressed its opinion in terms not to be mistaken. Let us now turn to some of the evidence which (added to their own experience¹) led the peers composing it to make these strong representations. It will be seen that it came from many and perfectly independent sources:

2618. Do you not consider one great burden upon the landowner to be the various expenses attending conveyancing?

Mr. Blamire (Tithe Commissioner). Certainly.

¹ The Committee was a very influential and numerous one. The law lords upon it were the Lord Chancellor (Cottenham) and Lord Brougham.

5233. Have you, in considering the subject of the burdens upon the land of this country, considered the grievance falling upon it in consequence of the present system of conveyancing?

Mr. James Stewart (Barrister). Yes; I have paid considerable attention, I may say, to that subject.

5251. Does that tend to impede the commerce in land?—I think so.

5409. Are you acquainted with the operation of the system of conveyancing upon the transfer of land?

Mr. Senior (Master in Chancery). I generally know that it imposes great difficulties, great expense, great delay, and great uncertainty.

5417. Are you aware whether the difficulties and expense affecting the conveyance of land have a tendency to lower the value of land in the market, when brought to sale in this country, more than in other countries? It seems, that naturally they must, and that no person would give the same number of years' purchase. In the first place, it is clear that the expenses of sale and the expenses of purchases must together be taken off the value of the property. If an estate is worth 1000*l.* a year, and the transfer cost 2000*l.* to the two parties, that must be taken off in the beginning.

2765. Can you give the Committee any statement of the expenses to which real property is subject upon transfer and mortgage?

Mr. Baxter (Solicitor). I have drawn out an estimate of the expense per cent. upon sales and upon mortgages, with reference to the amount of sale and the amount of mortgage. With regard to sales, I find that upon a sale of 50*l.* value, the expenses, including the stamps, amount to no less than thirty per cent.; that upon a sale of 100*l.* value, the expenses amount to fifteen per cent.; upon a sale of 600*l.* value the expenses would be five per cent.; and onwards, no matter how large a sum, up to 100,000*l.*, beyond which I have not gone, the expenses would be four per cent; the stamp upon a large amount being one per cent., and the expenses of the sale and the purchase being three per cent; so that every transfer of real property is taxed, practically, by the laws and stamps of the country to the amount I have specified. On mortgages the expense is rather less; upon smaller sums it is equal, but upon larger sums it is very much less. A mortgage for 50*l.* would cost, in stamps and law expenses, thirty per cent.; a mortgage for 100*l.* would cost twenty per cent.; a mortgage for 450*l.* would cost seven per cent.; a mortgage for 1500*l.* would cost three

per cent. ; a mortgage for 4500*l.* would cost 1*l.* 13*s.* 4*d.* per cent. ; a mortgage for 12,500*l.* would cost one per cent. ; for 25,000*l.* it would cost about 15*s.* per cent. ; and for 100,000*l.* it would cost about 12*s.* per cent.

It seems clear that the present system prevents many dealings with land.

2773. Do you know many small sales that have actually been prevented in consequence of the expense of stamp duties ? Have you known instances where land has not been sold on that account, where it was desirable to be sold ?

Mr. Baxter. The expense of a sale is always a drag upon the sale of property, *and therefore people, on that account, are more unwilling to invest in real property than they otherwise would be. Only those invest who wish to hold.* They make investments in railways and in the funds, and in other transferable securities, temporarily ; and if it were not for these expenses upon the purchase of land, *they would, in many cases, invest for a time in land,* and land would sooner feel the cheapness of money than it does now, whereas land is now the last to feel it.

4459. Is not the transfer of landed property accompanied by great expenses in the legal inquiries which take place ?

Mr. Hyde Greg (Manufacturer). Certainly ; and a very great evil it is ; and it affects the value of land very materially.

5272. *Mr. James Stewart.* The great circumstance now, even greater than the length of the deeds that drives purchasers from dealing in land, is the uncertainty affecting the title. No man knows, and that of course operates in preventing a purchase, what the expense of the title may be, or what title he gets at all. All that you can buy at present is a probability. You cannot buy any thing like a certainty, you can only buy at best a probability. This, in my own opinion, excludes a very large class of persons from dealing in land at all.

5410. So that a person who wishes to sell land never can tell whether it will take one year or two years, or three years before it is completed ; and a person who wishes to purchase never can tell whether he shall get his purchase in one, two, or three years, or whether before the purchase is completed both parties may not be landed in a Court of Equity on account of some supposed defect in the title ?

Mr. Senior. Each party certainly incurs an attorney's bill, but I do not think that the number of suits is large, I have been

struck since I have been master with the smallness of the number of suits for specific performance. I think that there is little of really defective title. Titles almost all seem to be safe for holding ; but the difficulty is to transfer them.

5411. Is there not a material difference, both in law language and in common parlance, between a title that is good to hold and a title that is marketable?—The fact is, that there is scarcely any title that is marketable.

5423. Do you see any reason why the Crown should be exempted from the forty years' limitation?—I see none whatever. I was asked as to the value of land abroad. I do not know it accurately ; but I do know that the number of years' purchase in almost all the better part of Europe is much higher than in England. It is thirty-five on the borders of the Rhine.

5461. Are those expenses of making out the title capable of any *à priori* calculation or estimate?

Mr. Senior. Not in the least. It may cost just as much to show a title to a single acre as to a whole estate. Nobody who thinks of selling his property has the least guess what it will cost him to sell it, or how long it will take. All that he knows is, that there will be an attorney's bill. How great it will be he cannot guess.

5460. Are there any cases which have come to your knowledge, which you can state to the committee, where there have been very great expenses arising out of the inconveniences of the laws of conveyancing which you have detailed?—I do not know the details. A solicitor could tell that better. But I recollect that I was told that it cost Mr. Templar 4000*l.* to make out the title to a property which he sold to the Duke of Somerset, which was approved by me, and that it cost the Duke of Somerset more than 1000*l.* to approve of that title. I think that I had 300 guineas out of it.

5425. Do you consider that the increased number of years purchase in foreign countries is to be attributed mainly to the difficulty and expenses of the transfer of property in this country?—

Mr. Senior. Certainly—a greater number of years' purchase abroad could not exist unless there were great facilities of transfer. It would have been impossible to have sales of small bits of land if our English system of conveyancing had existed ; and I am inclined to think that one of the principal reasons for the difference of value must be the different law of conveyancing. Our system, in the first place, much diminishes the value, and, in the second place, excludes all small purchasers.

5426. Do not you conceive that in excluding all small purchasers you are practically excluding the greatest number of purchasers?—Yes; their number would more than make up for the mediocrity of their means.

5430. With regard to the anxiety to invest in land in France and other continental countries, does it not proceed in some degree from the few facilities which they have of investment in any other very profitable line, arising from the small quantity of manufacturers, and the small quantity of commercial enterprises in France and other countries on the Continent?—I think it rather arises from the saving disposition of the people. They are a much more saving people than we are. I do not know that they have any less facility of investment than we have. The funds are considerably cheaper. They may either buy into the funds or lend on mortgage. In Belgium, where there is quite as much facility for the employment of money in commerce and manufactures as here, the value of land is higher than even in France.

5470. You have stated that you consider that one of the great burdens upon land is the mode of conveyancing. It is only a burden upon persons who want to part with their property?—Or to buy.

5471. Or to make a settlement of any kind?—Yes.

5472. Or to raise money on it?—Yes.

5473. In fact, does it not involve all the ordinary operations of which any description of property is susceptible?—Certainly.

6928. Do you not think that these burdens upon the free transfer of real property have a strong tendency to diminish the saleable value of land?—*Mr. Heathcoat*, M.P., and Manufacturer. Unquestionably they have; particularly small portions.

Let us also add a word as to the social advantages which would arise from small holdings.

4890. *Rev. R. Jones* (Tithe Commissioner). If the country goes on prosperously, I contemplate its being checked by the elevation of the habits of the lower orders. As they approach nearer to the habits of the higher orders they increase less in proportion. The increase of the human race is, contrary to a very eminent opinion, much more slow as the command of all the means of subsistence becomes more perfect, and therefore if the country is to go on prosperously, I calculate upon improved habits. This country must always be at the head of the world in wages. I think it would be very useful if you could introduce the system of taking care that every poor man who is deserving, shall have some property. The mere fact of having property, though it may be

a vulgar kind of influence, yet is the surest foundation of many beneficial habits. Every agricultural labourer in the country should, if possible, have a garden of such a size as would not interfere with his industry as a labourer; that is the case in some parts of the country. Again, Mr. Selmes, in Sussex, who is one of the largest cultivators in the country, but who is interested as a landlord as well as a tenant, and who therefore is removed from that unhappy kind of influence which makes tenants often use the poor rates to their own advantage, is powerfully raising the habits of his labourers. He has between seventy and eighty workmen. Every labourer, by Mr. Selmes's assistance, milks his own cow and brews his own beer; and if habits of that kind could be generally introduced, then the labourers would not marry until they had a cottage, and could have their own cow.

6921. I think, says *Mr. Heathcoat*, it would have a most beneficial effect upon labourers and also a most important effect upon society at large if the more industrious class of persons were enabled to acquire property in their cottages and gardens. The satisfaction of living in his own house would be gratifying to his feelings, and would have a beneficial effect on his conduct. I think that instead of having, as I am afraid to a great extent we now have, a mass of the people possessing no sympathy with the ownership of property, it would give a feeling of the sacredness of property and the necessity of securing it.

Lord Monteagle justly remarks on this last evidence:—

“These benefits, which the witness describes with so much truth and feeling, are greatly abridged by our law of real property, and the expense and difficulty of making an assignment or conveyance of real property.”

This state of things also affects the mortgage of lands.

2756. Is there not some expense upon assigning a mortgage? — *Mr. Baxter*. It is not so great upon the larger sums, because the ad valorem is less; upon smaller sums it is more, because they do not allow you to test it by ad valorem. I would offer one suggestion with regard to mortgages. The duty is exceedingly unequal; the stamp duty is about three per cent. upon the smaller sums, and only two shillings per cent. upon the larger sums. It bears exceedingly hard upon small proprietors; and it is not only a hardship upon small proprietors, but it is a hardship upon small capitalists; for I know, practically, that people who have saved their 50*l.*, 100*l.*, or 150*l.*, cannot get a secure mortgage, the expenses being so great

that people will not give it; and persons who possess property worth 200*l.* or 300*l.*, wishing for an advance from an individual, or from a banker, of 50*l.* or 100*l.*, or 150*l.*, cannot get it, except at the ruinous expense I have mentioned. And this is so much the more unfair, because the matter of mortgage is so simple as to be one of those things that might be done statutably, as has been attempted in the case of conveyances. There would be no difficulty in giving a specified form; for instance, "I mortgage to A. B. for 500*l.* such a property," and letting the details of that mortgage be set out in an act of parliament, so that there should be no necessity even for a solicitor to look at the instrument, with reference to making out the mortgage. The title, of course, could not be gone into without a solicitor; but in ninety-nine cases out of one hundred upon this small amount, parties would borrow and lend upon that security if it could be done at a small expense of stamp, and without the expense of legal conveyancing.

We disagree with Mr. Baxter in thinking that a solicitor may be dispensed with in these transactions. We are not for superseding legal assistance, as without it the client would never be safe. But we are quite sure that it may be rendered much more cheaply.

Now how does this state of things operate on the value of land? The evidence seems conflicting. But its tendency is to show it has not of late increased in value, which is surely not what might have been expected.

5615. Has the sale-value of land, as computed by years' purchase, upon an improved rental, increased or diminished, within your knowledge? — *Mr. Clutton* (Land valuer, London). I think it has rather increased within the last two years.

1248. Has much alteration taken place in the value of land of late years? — *Mr. Davy* (Land agent, Devonshire). There has been a reduction in the last seven or eight years.

6821. What is the value of land for sale as to the number of years purchase? Is it diminishing, or increasing, or stationary? — *Mr. Elsey* (Clerk of the Peace, W. R. York). I should be inclined to say that it was stationary. There is no increase, and perhaps no great diminution.

Having now stated the difficulties which surround the transfer of land in this country, we avail ourselves of the experience of one of the witnesses, Mr. Banfield, to see how this matter stands on the Continent.

5022. Have you made yourself acquainted there with the legal transactions respecting the conveyance of land? — *Mr. Banfield.* I have purchased land, and houses, and mines; and, therefore, I am able to speak on the subject of conveyancing.

5023. Will you state the mode of conveyancing? — The mode of conveyancing is by applying to the parish registrar; or, if it is in a town, to the town registrar.

5027. Will you deliver in the form of the contract?

The same was delivered in, and is as follows: —

Form of contract of sale of real property in the Duchy of Nassau:

(Translation:)

Note of sale. — Extracted from the contract protocols of the district of Wisbaden, in the year 1841, p. 1047 and 1048.

By virtue of a contract of purchase and sale, exhibited 15th Dec. 1841, Johann Joseph Blees, of Biebrich, and his wife Anna, formerly Weiss, sell to Mr. Banfield, of London, now residing here, the parcels of land under-mentioned for the sum of 2175 florins, in terms — two thousand one hundred and seventy-five florins, — to have and to hold as his own.

The following conditions were stipulated in this contract:

1. The purchaser takes immediate possession, and undertakes from 1st Jan. 1842, the payment of all taxes on the property.

2. The costs of conveyancing, according to the usual forms, are undertaken by the buyer.

3. The payment of the purchase money takes place when the official note of sale is handed to the buyer. The money is to be paid on the footing of twenty-four florins to the mark, as is current at Frankfort on the Maine.

4. The seller retains his right to the property until the stipulated payment is made.

On the Back.

Registered, Reinhard.

This to certify the truth of the copy.

Stamp, 6 florins. }

Fees, 3 florins }

(L. S.) (Signed)

HABEL, Burgomaster.

The annexed contract is hereby officially confirmed. Wiesbaden, 24th Dec. 1841. Duty on confirmation, 43 florins. The administrative magistrate of the district of Wiesbaden in the Duchy of Nassau.

(L. S.) (Signed) WINTER.

5031. What is the form of register, that the court may be satisfied that the property does belong to the individual who seeks to register it?—It is very much like what is done in Dublin as regards mortgages.

5032. You say that there is a registry made of deeds, and that then the court, upon the application of the parties, grants that paper to you; what is the course that they pursue to know the identity of the parties in the first instance? How do they know that Mr. John Joseph Blees and his wife are the persons whose names are registered in that court?—Because their title must be in the register already.

5042. Will you now state the different expenses incurred by the transfer?—The expenses vary in every State in Germany. I have bought some property in Prussia, and some in Nassau. In Nassau the transfer tax is 2 per cent. on the value of the property, and a small stamp, 6 gilders, upon two thousand.

5052, 5053. You are aware that the doctrines of law in this country in the register counties as well as in Ireland, establish very subtle inquiries with respect to constructive notices, thereby depriving parties of the benefit of the registry? Are there any such principles of law abroad?—I believe none.

5067. As a result of that, is there a considerable competition of small purchasers for the purchase of land?—Unquestionably.

5088. Does there arise much litigation out of this mode of the transfer of property?—Scarcely any.

We have stated the grievance. Let us now look to the remedy,—and first as to Registry. In another part of the present number we have been able to lay before our readers the latest information on this subject. We may fortify these Reports by the evidence of persons who do not rest their opinions on surmise, but on practical experience in Scotland and Ireland.

As to Scotland.

6543. Is the making out a title to Scotch property very much facilitated by the Registration?—The Lord Advocate (*Duncan Macneil*). I think it is by the confidence that is acquired as to the state of the property. No doubt if you were to leave matters in other respects as they are, and to say it shall not be necessary to register, you would save the expense of registration, but then, whenever you came to convey there would be other inquiries which would be more expensive than the Registration. The late Lord Advocate also alluded to a recent conveyancing reform in Scotland.

6526. Last year an alteration was made in the law with regard to Instruments of Sasine, under a bill which I introduced into the House of Commons, which passed into an Act. The leading character of the bill was to dispense with the necessity of going to the lands to go through the ceremony I have described. It was thought that although that was a very important ceremony in former times in order to give publicity to the transference of the right or the burden, and that parties might know who they were to deal with, and what reliance they should place upon their credit, yet that now, when writing was so much more general, when the means of communication by writing were so much improved, when records were so much looked to, and so entirely relied upon as they are now, the ceremony upon the ground was little else than an unnecessary expense to the parties, and therefore the leading object of the act of last year was to do away with the necessity of going to the lands to go through that ceremony. But still an instrument of sasine is made out by the notary, and is taken to the Record. Another alteration of the law by the act of last year was, to do away with the necessity for recording the instrument within sixty days, because if the right is completed by registration, and is to compute according to the date of the registration, it seemed to be of little importance to compel the party to register within any definite time. To say that he should lose his instrument of sasine altogether, and be required to make another, by mere lapse of time in recording, seemed unnecessary, and thus as the possession now consists, not in going to the land and there taking sasine, but in putting an Instrument of Sasine into the Record, the act of last year both dispenses with the necessity of recording the instrument within sixty days, and saves the whole expense of going to the lands.

And as to Ireland.

6205. *Sir M. Barrington* (an Irish Solicitor). "I think the advantage of Registry is, that where the deeds are lost you supply the defect by making out the title without having the deeds. This is so if the deeds are accidentally lost or burnt, which has happened frequently in Ireland. I know one instance of a gentleman in the county of Wexford, in which all his title deeds of the property were burnt during the rebellion, and we were able to make out the title from the Registry for another client in our office.

6211. Therefore, are the Committee to understand that there is nothing in the Irish Registry Law which compels a party permanently to part with the possession of his title deeds, and that it is

open to his own option either to make a full disclosure of his title by a full memorial, or to make only a partial disclosure by a partial and limited memorial? — Certainly. And to exemplify that, you may register a deed having reference to property in Ireland by giving the deed, with a memorial, to a commissioner in London, a Mr. King, of Southampton Buildings, and he forwards to Ireland the memorial, and returns that deed, with the certificate that he has received the memorial; so that you need never part with the possession of your deeds if you do not please, save while being compared in the office with the memorial. The object in lodging the deed in the Register Office is, to have it certified that it is registered. It is left there for one day to be compared with the memorial.

6214. Passing by the advantages of the Register, which may be incident to cases of the loss or destruction of deeds, are you able to state to the Committee, from your professional experience, whether the existence of a Registry facilitates the general examination of title, and thereby lessens the expenses to a considerable extent of the assignment or conveyance of lands? — It most assuredly does in Ireland. I cannot speak much of England, not having had much experience of the Conveyance of Property here. In Ireland, you first trace your title from a grant from the Crown, and you are not satisfied without seeing that there is no reversion in the Crown. Some of the ancient grants in Ireland are limited ones for a certain number of years, so that you always trace back till you see a grant from the Crown, then for the next hundred years after the Crown's grant you are satisfied with the Register search in almost every instance, there being no deed to be had; and then you take up the deeds and family settlements for thirty or forty years, and in that way you are quite satisfied with the abstract of existing deeds and the memorials, between the original grant and the recent deeds.

II. We now come to the simplification of deeds; and this, we think, is being fast accomplished. We would not wish to place too highly the merits of the two acts which were passed in the last session for giving short forms in certain very familiar cases, or of the bill which has been brought in in this present session for extending their principle to many other transactions. We think these bills have been rightly characterised "as a legislative expression of opinion that the profession should exert themselves in every possible way to cheapen and simplify the necessary dealings between man and

man connected with real property," and it must be remembered that if the effect is produced, even although the mode prescribed by the acts be not pursued, yet the good intended by them will be done.¹ We have on several previous occasions endeavoured to point out the advantages of the provisions of these bills. At the time that we write this we cannot ascertain whether any further progress will be made with the new bill in this session. The present unsettled state of parties is, we fear, unfavourable to it, and unless it can be properly considered, it might be advisable to withdraw it till a fitter season. We have repeatedly expressed our wish that it should not pass without such consideration. It is too important and too extensive a measure to be hurried through in the midst of party conflicts. But the profession may be quite certain that in the present temper of the House it would be easy to carry this bill or almost any other having its object. If, then, it should be withdrawn, we trust it will be understood that this step is taken only that the measure may receive the fullest consideration, and that in legislating on so difficult a subject there may be no hurry and no surprise to any one. The friends of the bill may also rely on this, that even if it be delayed for another session, the result will probably be that a more complete measure will pass; and the public feeling in its favour, we are satisfied, will not be diminished by this postponement. In order that we may have safe legislation on this matter, let us not be too eager.

III. The third remedy is the remodelling of the stamp laws to which we adverted in our last number²; and it will be seen that the Committee have come, on some points, to the same conclusions at which we arrived, and which we ventured to submit to our readers. *Lord Monteagle* makes the following recommendation:—

"The revision of the stamp-duties, not with a view to the reduction of revenue but to a better apportionment of burdens,—an

¹ We observe that the Leases Act is recognised by a Bill introduced by Sir Robert Peel's government for facilitating leases in Ireland, which has been adopted by the present government.

² *Ante*, p. 177. et seq.

adoption of an *ad valorem* scale of duty relieving small properties from the present unjust and disproportionate charge, and making an equitable distribution of all duties on the sale and transmission of property, real and personal, whether during life or after decease, both on ordinary conveyances and in the shape of probate or legacy duties, so as to remedy all existing inequalities, and to repeal all undue and partial exceptions."

And the document contains the following observations:—

"The stamp duties furnish instances both of exemptions granted to the landed interest, and of burdens to which they are specially subjected. The net amount of these duties for the year which has just expired is 7,660,339*l*. Some of the objections raised against these duties do not seem peculiar to Real Property, but are common to property of all descriptions. The unequal rate at which the smaller transactions are taxed as compared with the greater, adopting a principle the very reverse of an *ad valorem* scale, is most oppressive and unjust. 'The stamp upon a 100*l*. sale would amount to 5*l*. per cent; upon a 300*l*. sale would amount to 2*l*. 10*s*. per cent; upon a 500*l*. sale to 1*l*. 14*s*. 3*d*. per cent; and above that only to 1*l*. per cent.' This is the evidence of Mr. Baxter. Mr. Stewart states that the stamp laws press most hardly upon small dealings. A proposition has been ineffectually made to Parliament at a former time to remedy these inequalities, by the introduction of a uniform and more equitable scale. This remedy deserves adoption. Beyond this taxation presents other considerations of great importance. The inequalities of the legacy and probate duties, and the exemptions granted to real property of certain descriptions, have long been the subject of observation and complaint. The amount of legacy and probate duties received in Great Britain from the period of their introduction to the close of the last year, amounted to 69,528,178*l*., and the capital assessed to the legacy duty during the same time to 1,339,419,511*l*. When Mr. Pitt introduced these taxes, in 1797, he proposed that they should include all property, real as well as personal. The existing exemptions in favour of land were adopted during the progress of the measure through Parliament, contrary to the original intention of the minister; but great misapprehension prevails in respect to these exemptions. It is not true that all real estates are relieved from these taxes; all leasehold property is liable to duty, as well as all freehold estates directed by will to be sold, and distributed as money. When the extent and value of house property, of church lands, and other leaseholds, is considered, the greater part of which are held for

terms of years, it must be clear that a considerable portion of landed estates are not included within the exemption. Yet, after making all allowances under these heads, it is still manifest that landed property enjoys a peculiar favour and advantage in respect to these taxes. Such inequality the Committee are not disposed to justify — but, on the other hand, it should be borne in mind, that landed property in its conveyance *inter vivos* is burdened by much heavier charges than fall upon the transfer of personals. What justice would therefore seem to require is, a revision of the whole of these taxes on the assignment and transmission of property, both real and personal, whether made during life or after decease. An equal and just apportionment of these burdens, without favour or preference to any peculiar description of property, is the remedy which the nature of the case requires." (p. 44.)

The Report does not go quite so far, but the following portion of it is worthy of attention: —

"Freeholds are exempt from legacy and probate duty. The committee have not been able to ascertain the exact amount of legacy and probate duty paid by leasehold property; but they feel it their duty to draw attention to the fact, that leaseholds are not only liable to the stamp duties on dealings with the property *inter vivos*, but also to the probate and legacy duty. Nor can the committee avoid reminding the House, that legacy duty is paid in every case where the testator has devised his lands to be sold; and according to the evidence of Mr. Baxter, a solicitor of very great practice, nine wills out of ten in the middle ranks of life convert the whole land into personalty for the purpose of division. The evidence of Mr. Pressly tends to confirm the previous evidence of Mr. Baxter, that a considerable portion of the legacy duty is raised on freeholds devised to be sold for the purpose of division. The witness states that Mr. Trevor, the controller of the legacy duty, estimates it (the portion raised on freeholds devised to be sold) at five twelfths of the amount. Assuming the legacy duty to be 1,200,000*l.*, he estimates the proportion of duty arising from real estate at 500,000*l.* 'I think,' the witness continues, 'he has put it too high. I do not think that more than a fourth, or scarcely a fourth, of the 1,200,000*l.* legacy duty arises from land.' The witness, however, does not include leasehold property in his calculation, which, being liable to both probate and legacy duty, must be added to the above-mentioned estimate, before we arrive at the full portion of the legacy duty arising out of the proceeds of land." (p. ix.)

The following evidence as to stamps is worthy of attention:—

What is the stamp duty upon leases, and below what amount is there any exemption?

Mr. Pressly (Secretary to Board of Stamps). Where the rent is under 20*l.* the lease is liable to 1*l.* duty. But great relief was given in the last session of parliament, by making all agreements for a lease liable to a stamp of 2*s.* 6*d.* instead of 1*l.* *It would be a great relief to reduce the duty upon small leases.* I think it was proposed by Lord Monteagle, when Chancellor of the Exchequer, to make a reduction upon small leases.

Is not the stamp duty very unequal in its pressure?

Mr. James Stewart. Yes; the present stamp laws press most hardly upon small dealings.

But in the case of land conveyed by settlement, is there any stamp?—There is no *ad valorem* stamp when land is settled.

Where money is settled there is a stamp?—Yes; or where funded property is settled.

If any change were effected for the purpose of relieving proprietors with reference to the stamp duty on conveyances and mortgages, would it not be fair to throw the burden upon settlements rather than upon succession.—At present there is certainly an inequality in levying the stamp duty. You do not levy it upon the settlement of real estate, and you do levy it upon the settlement of personal estate.

If the landowner is relieved of the stamp duty upon conveyancing, would it not be necessary to levy it somewhere; and would it not be better to lay it upon settlements rather than upon succession?—I think that the whole of the scale of the stamp duty requires re-modelling, and I think that would be part of it.

Would it not be necessary for the purpose of levying the probate and legacy duty upon land, upon the occurrence of the payment of the duty, to have a valuation of every person's estate?—I conceive not. I conceive that you have that valuation now. For instance, under the property and income tax you have a valuation which might be taken, if the duty were remodelled, as the basis of that application of it.

Must not there be that valuation with respect to the description of leasehold property which is now subject to the duty?—Yes; there is constantly that valuation. Leaseholds are particularly hardly dealt with, because they are not only liable to the stamps on dealings with the property *inter vivos*, but they are liable also to the probate and legacy duty.

Altogether, we have little doubt that we shall speedily see the revision of the stamp laws undertaken in a just and candid spirit, and we know of no subject to which the present government can better direct its attention than this; as presenting a practical grievance allowed by all to exist, and admitting of an easy and safe remedy. Indeed, the whole subject of this article will require the careful and deliberate consideration of the government; and we have full confidence that they will take the proper steps to satisfy demands so loudly expressed, and so reasonable in themselves.

While this sheet was passing through the press, we have received much pleasure from perusing the pamphlet of Mr. Sewell, as giving another proof, if any were wanting, that all rational solicitors are becoming aware that a great change is necessary in the practice of conveyancing, and are willing to assist it. Mr. Sewell shows much knowledge of the subject, and writes in an easy and practical manner. We observe, indeed, that he disapproves of some of the recent real property acts; but we are far from objecting to this, as he states his objections temperately and coherently; and these very objections give weight to his own suggestions, as showing that they proceed from no restless desire of change, or visionary love of reform. Mr. Sewell, we are inclined to think, only represents the sentiments of the very large majority of his own branch of the profession. He thus speaks of the labours of the Real Property Commissioners, with reference to their bearing on the practice of the solicitor:—

“The distresses of clients come close home to us. Whilst they are enduring the suspense of an investigation of title pending the completion of a purchase or the settlement of a loan, we are their every-day bosom confidants,—frequently the victims of their discontent. At all times we stand before them as claimants for bills of costs, the mystery of which is, of course, as unintelligible as a physician's prescription. It would be hopeless to attempt to enlighten the understanding of a dissatisfied client upon the necessity for getting in outstanding terms, procuring deeds of covenant to produce title deeds, tracing a legal estate, or the like. All which he can possibly know of the matter is the amount of delay and expense to which he is in course of being subjected, and for which he perhaps very unjustly holds us chargeable.

“There can be no doubt therefore that we have a favourable opportunity of learning at least the nature of the evil and its magnitude; and this is an advantage, for I cannot but think that those eminent persons whose counsel has hitherto been sought for devising remedies, have undervalued the malignity of the disease, and so rather have wasted their learning and ingenuity in contriving palliatives for symptoms, than applied themselves to the seat and source of the complaint.

“It would be extremely unbecoming in me to treat the labours of those distinguished men with the least disrespect. But the result and final effect of them has now become matter of experience, and the public voice proclaims that the measures which have followed their recommendations, have not, in fact, alleviated in any perceptible degree the evils so loudly complained of. The professional practitioner is able to recognise the utility and value of some if not all of them; but the uninitiated part of the community are still waiting and asking, and beginning to clamour for some fruits of the promised reform.

“It is now many years since the Commissioners of the Law of Real Property closed their inquiries, having, as it was supposed, effected every thing which could be effected in the way of investigation, and recommended every thing which could be recommended in the way of amendment. Some of their most important proposals, however, yet remain untried.

“Some of their suggestions have been adopted. Certain ceremonies in the mode of barring entails and effecting the transfer of the interests of married women by fines and recoveries, have been abolished, and other forms simpler and less expensive, have been substituted. The period within which dormant claims may be enforced, has been abridged—a measure in some respects questionable in point of principle, and which has been found wholly inefficacious as far as it was intended to curtail the difficulty and expense of conveyancing. The law of dower has been altered to the detriment of married women. New forms for the execution of wills have been invented, opening the door for nearly as much difficulty and doubt as the measure was intended to prevent. Other changes of a like kind have been introduced. I have no intention to dwell upon them in detail. As to some, I cannot think that we have gained by the alteration. But as a whole, may it not at once be said, without hesitation and without any charge of presumption, that they have wholly failed of their true object? What the public required (and they were the real parties complaining), was diminution of the inconveniences which they practically felt, greater certainty and quickness in the transaction of their affairs, and diminished cost.

"It will perhaps be said that these salutary effects have been counteracted by an evil principle residing in that branch of the profession of which I am a member,—that we have set ourselves to work to maintain our own interests, by thwarting the natural good tendencies of the measures to which I have adverted. An imputation of this kind is wholly groundless. We have no desire to tax the community for our exclusive benefit, or to uphold a system injurious to the public for the sake of mere selfish objects." (pp. 2—4.)

Mr. Sewell shows even less favour to some of the real property acts of last session. But, although he condemns them, we are sure that he will, on reflection, see that they must, in the end, be attended with advantage to the cause which he is desirous of serving. The law reformer is, indeed, somewhat hardly tasked! The man of any other science knows, that it is only after a series of imperfect experiments that the wished-for truth is obtained; but the legislator is expected to produce a perfect measure, which will at once displace all preceding inventions, and satisfy every body. It may be exceedingly uncomfortable to subject the practice of any branch of the law to a series of tentative acts; but we would ask, how is it possible to accomplish the desired end without it? In the present *transition* state of the law it must, we fear, be so. Who would not hold up both his hands for one great and final measure which would remedy all evils, and prevent the necessity of all future legislation? but then, where is the wise man who shall be able to devise this great and comprehensive scheme? We fear we have not yet discovered either the man or the measure. We fear we can only treat law as all other sciences are treated; that the true method of reforming it, that the proper remedial measure, can only be found out by the slow and painful process of experiment; that we must learn the nature of the ground even by our falls; and that it is only after repeated failures, and much straying out of the true road, that we shall at last discover the wished-for goal. We are disposed to think, then, that Mr. Sewell, who is evidently influenced by no sordid or mercenary motive, will view with candour the labours, and appreciate the motives, of those who have, at any rate, succeeded in rousing public attention to the present

state of the law of property. At all events, we are glad to have him as a fellow-labourer ; the more so, because he evidently thinks for himself, and his voice proceeds from a different quarter. He thus boldly lays bare the grievance :—

“ I do not imagine that the general expense of transactions relating to real property has in any degree been diminished ; on the contrary, I think it has increased, and is still increasing, and this by the inevitable force of circumstances. The affairs of men in the present day become extremely complicated, and this complication necessarily entangles the titles to real property. Every succeeding year adds to the evil. Every mortgage, charge, bankruptcy, will, or settlement is the parent of a whole progeny of transactions ; and it is matter of experience that titles, especially those which are undergoing frequent changes, as many do, are becoming more and more involved ; whilst every step taken in dealing with them becomes attended with a constantly growing expense.

‘ *Ætas parentum pejor avis, tulit
Nos nequiores, mox daturos
Progeniem vitiosiore.*’

“ These circumstances operate in other ways very injuriously. With difficulty and entanglement come uncertainty and insecurity, and, what perhaps is of still more practical mischief, a total impossibility of forming fixed arrangements with regard to time.

“ Expense, uncertainty, and delay, keep pace with each other ; and all this is chargeable, not as unobservant persons are apt to think, upon the practitioners themselves, but upon the system of which they are merely the ministers.

“ My object will be to place before your Lordship the result of my practical experience as to the actual causes of those evils, in the belief that a true perception of them will lead, by a necessary process, to a perception of their proper remedies.

“ It would be useless to speculate at the present day upon abstract theories of real property. Every age regards it under its own peculiar aspect. We may be inclined to favour this or that principle, which may seem to be embodied and represented in any particular system ; but practically we are compelled to deal with things as they are. It would be vain and idle to frame schemes of legislation adapted merely to a fictitious state of things ;—for instance, in the present utilitarian age, to frame laws applicable to the feudalism of our early history. They would fit us as little as a suit of clothes which we have long outgrown.

“ As a matter of abstract opinion, I may think that society has

lost altogether the true idea of the relation in which the ownership of land stands in the general economy. In a perfectly constructed state, I can imagine territory to be the very nexus and basis of the whole system ; that by which the whole community would naturally be bound into one. The feudal system presents us with such an idea under a military form. Something of the same kind we still retain in a very faint degree in the duties, responsibilities, and privileges which we annex to the possession and ownership of land. What we may term a natural instinct tends in the same direction, for we usually assign a superior status and dignity to the landed proprietor over the possessor of mere moveable wealth.

“I may believe that all this points to a better and more natural order of things, from which we have now widely diverged ; one in which the ownership of land would be governed by rules wholly inapplicable to the present age. But to introduce or endeavour to retain them with any good effect, would require the whole structure of society to be re-arranged, and its entire *ηθος* to be changed.

“And all this would belong to a totally different question from that which I am now concerned with. We have fallen upon an utilitarian age. All things about us have assumed that character. If, by maintaining the forms of an obsolete system, we could reproduce the true idea and sentiment of which they were the expression, it might be worth while to consider well before we cast them off. But they are to us only the shell and the mould,—the outer crust from which the inner spirit has departed,—and we can no more revivify them than we can raise the dead. I do not mean that we should throw aside the remains of ancient forms with carelessness or irreverence, still less in a spirit of ignorant self-sufficiency. Though they have lost their energy and power, they represent to us, like the bones of the dead, what once was a living and active principle, and we may study them as the comparative anatomist studies the exuviae and fossil remains of extinct species of animals. But to attempt to retain them, whilst the character of society has undergone an essential change, only involves us in a series of difficulties. We place ourselves in a state of contest against forms which are of a nature foreign and unsuited to us.” (pp. 6—8.)

Mr. Sewell then enters upon the inquiry, “Are the evils of the present law of such an extent or character as to justify a great change ? The general opinion of society will answer

the question unhesitatingly in the affirmative. The voice of lawyers themselves is to the contrary." But this voice is now becoming much more feeble, and gives now only an uncertain sound. And Mr. Sewell shall show us why. "Looking," he says, "to real property, under its present aspect, as a mere useful commodity, a subject of barter and merchandize, what we require is a system of law adapted to such a view of its character; we require, therefore,

"1. Security of tenure.

"2. Facility in transferring it from buyer to seller, and from borrower to lender.

"3. Certainty in point of time in all our arrangements respecting it.

"4. A reasonable, moderate, and well ascertained scale of expense attending our various dealings with it." (p. 10.)

Mr. Sewell proves without much trouble that the present system is deficient on all these points, and here we must make another extract :

"No man can fix the day when he will enter on his new purchase or discharge existing liabilities by receiving his purchase or mortgage money. During the suspense, a loss of interest is suffered by one party or the other; but this is but a small item in the catalogue of evils. One transaction generally hinges upon another. Sometimes ruin or safety is the stake at issue upon the mere question of time in the completion of a sale or mortgage. If all the damage, immediate and consequential, which society suffers from these circumstances, could be summed up, it would, I am convinced, reach an alarming amount.

"These delays are not unfrequently attributed to the laches of practitioners. It is hastily assumed that they are less diligent or more scrupulous than they should be. But, in truth, any system which cannot make allowance for defects of this kind, must be radically defective, for these are faults of human nature; nor does it diminish the objection to the system, to throw the odium of the failure upon the negligent or over-scrupulous agent.

"But, in fact, the fault is not in any great degree chargeable upon us. If in some instances we occasion delay, in others we take upon ourselves risks beyond the strict obligation of professional duty for the sake of avoiding it. The greater delays occur in transactions of larger moment. In these, recourse is had to the opinions of the higher class of conveyancers,—men of

eminence at the bar. Much delay arises here; not that this is attributable to them as a fault, for they are ordinarily men of great industry, learning, and quickness. But their numbers are limited, and they are the referees of a whole kingdom. Their chambers are crowded with papers, which fall into arrear from over-pressure.

“But in smaller matters, we (I mean solicitors) take on ourselves a vast amount of responsibility, in order to avoid the delay and expense which would result from reference to counsel. Yet this is scarcely reasonable. The guarantee required for the safety of the rich man's title ought not to be greater than for that of the poor man. If it is necessary to protect the large estate by reference to counsel, the poor man's cottage or field ought not to be left to its fate, or trusted to a less skilful class of practitioners; nor, whilst relieving their clients from expense, by diminishing their own profit, should solicitors be compelled to undertake these higher responsibilities.

“We have yet to inquire how far the present practice answers as regards its cost. The expense of all transactions respecting real property ought to be reasonable, that is, proportioned, in some degree to the value of the subject-matter; moderate, that is, affording adequate remuneration to the parties employed, without at the same time being burdensome to the property; and well ascertained, because on this partly depends the certain value of estates.

“Our system sadly fails in each of these particulars. The expense of a sale or mortgage is indefinite, governed by no rule, depending upon a variety of accidents, such as the nature of the title, the character or the conscience of the solicitor employed, the willingness or unwillingness of a purchaser to complete his contract.

“It is not only indefinite but frequently immoderate, that is, disproportionately large in comparison with the value of the property it relates to; and it is impossible to define its amount beforehand with any degree of certainty; nor does this arise through any assignable fault of the parties employed. The smallest cottage is perhaps the subject of as complicated a title as the largest estate, involving the same amount of labour and skill, and consequent expense. The only item which is governed by a scale, is the *ad valorem* duty on the instrument of conveyance. That, in fact, the cost of transactions is, in a certain degree, measured by the value of the property, only proves the general disposition amongst practitioners to adapt themselves to the reason of the case. But this is done by using a widely different course of practice as regards small matters from that observed in larger ones. A multitude of

things which are required, and are in fact necessary for the perfect safety of a title to a large estate, are passed by in dealing with a small one. The value will not bear the outlay. The thing itself would be consumed in establishing the right to it.

"This evil increases in magnitude in proportion as properties diminish in value. In cases of large amount it is scarcely perceived. As the scale descends, the proportion of cost advances. When we arrive at that class of transactions (perhaps the most numerous), involving amounts varying from 200*l.* downwards, it becomes excessive. No man can then borrow or buy with any reasonable assurance of being able to estimate his costs within a range of from 5*l.* to 15*l.* per cent. He cannot be safe even within these limits.¹ A demand for attested copies of deeds, or the deduction of title to some outstanding estate, may involve an expense approaching to, perhaps exceeding the value of the property itself.

"That such is not frequently the case is attributable to the forbearance and good conscience of the members of my own profession, not to any merit in the system.

"But this diminution of cost is accompanied with a loss of safety and certainty of title, for it arises only by the omission of many requisites essential, if not to the safe holding, at least to the marketability of title. In fact, I doubt whether any small property ever changes hands with a perfectly marketable title, that is, with all its proofs complete. The marketable title is a model of ideal perfection, without a flaw. This perfection may be approached, but is seldom attained; yet it is the marketable title alone which courts will force an unwilling purchaser to take. To reach it is usually a work of much trouble and expense. It becomes therefore a luxury denied to the buyers and sellers of small properties; yet it is, in fact, of no less importance to them than to the purchaser of many acres; or if the poor man can be made safe with a less degree of nicety and at a less cost, why do we incur the rich with expensive superfluities?" (pp. 13—16.)

Now we would ask any intelligent practitioner whether it is for the benefit of any class that this state of things should continue? That it is not for the benefit of the sellers and buyers, and other dealers in land, is surely manifest; but can it possibly be for the benefit of the lawyer? We will

¹ "A Court of Equity would probably not in so small a case enforce the delivery of attested copies, though why it should not, if they are important to the title, I do not know." (Mr. Sewell's note.)

put aside all questions of conscience and equity, we will let alone all moral considerations, (although, be it fully understood, we think the lawyer is fully as open to these as any other class of the community,) and we will try the matter by sheer self-interest,—and we would ask if it can be for the advantage of the lawyer to leave all dealings in land in the state here described—to disgust and possibly defraud his client; to render conveyancing transactions as difficult as expensive, as uncertain, and therefore as unfrequent as possible? If there be a feeling existing in the minds of the profession against reform, must it not arise from gross ignorance and prejudice? We cannot doubt that it is for the interest of the profession to rely not on the few but on the many, not on the one or two great clients, on Lord A. or Squire B., but on the middle classes, the shopkeepers, and the tradesmen, who now shrink with dread from all contact with the lawyer. Let us encourage not check the alienation of land; let us be prepared to assist not to thwart the attempts of those who would bring about a change of the present system: and in doing this, be assured, we shall best promote our own selfish interests. IT IS ONLY FROM THE PROFESSION ITSELF THAT THE PROPER REFORM CAN COME: LET US THEN ENDEAVOUR TO BRING IT ABOUT AS SOON AS POSSIBLE. But how is this to be done? Let us hear Mr. Sewell's remedy for the evils which he paints so vividly. He considers that "a general registry of *titles* is the only practical mode of remedying the greater evils." (p. 86). This is in contradistinction to a registry of *deeds* which he considers as "but the incumbrance of another form, and an additional expense." (p. 86). His plan of obtaining this registry is somewhat similar to that proposed in the second Report on Registry, given ante, p. 351, with which we presume Mr. Sewell was not acquainted, and he agrees on the conclusions already arrived at, that a general map or survey would be of the greatest benefit. He also considers that "the leading idea which would govern the whole would be that of the true unity and simplicity of legal ownership." (p. 90.) He thus further states his plan:—

"The most convenient divisions of such a registry would be into

local districts, about large enough each to occupy the time of a single registering judge. The circuit of such districts would vary—probably on an average each county would require three or four subdivisions. If any benefit were expected from a central or metropolitan registry, it might be secured through a duplicate registration in London, which would be a mere mechanical transcript of that in the country. I do not, however, see any sufficient object in this. Local situation is the real guide in all ordinary affairs respecting real property, and I see no reason why they should not be transacted actually on or near the spot. Such a method is surely as likely to suit general convenience as the present practice, according to which the place for the final settlement of these matters depends on the accidental place of custody of title deeds.

“But is it possible to make a registry of this nature available as a means for giving effect to the various modes by which property may be obtained, as by purchase, prescription, succession, descent, or devise?

“A registry of the nature which I have described would require the direction of a really efficient responsible officer conversant in the law of real property. Many such are to be found at the bar amongst practising conveyancers,—men who would be as well or better qualified to pronounce judicially upon points of real property law even than the highest equity judge. Men of this class must of course be tempted from a lucrative profession by corresponding remuneration; but the superior ease, dignity and certainty of income attending a judicial office would make up for some loss of income.

“A registering officer presiding over such a district court would be virtually a judge in the first instance in matters of real property. His operations upon the registry would be judicial acts, and would have, if unappealed against and unreversed, the effect of law. In cases of doubt or dispute, a very simple machinery might provide a remedy for enabling parties thinking themselves aggrieved to appeal.

“And is not the establishment of such a judicial officer agreeable to the evident wants of society? Is not this indicated by that constant recurrence to counsel which I have mentioned, as the ordinary practice in conveyancing? What is this but an attempt to reach in an imperfect and extra-judicial manner a formal sentence upon the validity of titles, upon which men may practically act? Such a practice may be regarded as a sign indicating the remedy required. If the state of the law is such as to require these *responsa prudentum* before men can venture to complete

purchases or mortgages, it seems to me incumbent on the legislature to provide them in a formal authoritative shape—for the poor as well as the rich—in small affairs as well as large ones." (pp. 99, 100.)

Here we leave the subject. Let the conveyancing reformers only keep united, let them act kindly and considerately towards each other, and we are quite sure that they will speedily be able to effect all proper alterations of the present system.

ART. XI.—SPENCE'S EQUITABLE JURISDICTION.

The Equitable Jurisdiction of the Court of Chancery, comprising its Rise, Progress, and final Establishment; to which is prefixed, with a View to the Elucidation of the main Subject, a concise Account of the leading Doctrines of the Common Law, and of the Course of Procedure in the Courts of Common Law in regard to Civil Rights; with an Attempt to trace them to their Sources; and in which the various Alterations made by the Legislature, down to the present Day, are noticed. By GEORGE SPENCE, Esq., one of Her Majesty's Counsel. 2 vols.

SINCE the days of Selden, we have had but few writers to be compared with Mr. Spence in extent and variety of legal erudition. Deeply versed in the laws of his own country, he not only explores the recesses of Roman jurisprudence, but, with untiring industry, investigates the rude and discordant institutions of the different barbaric tribes who, during the dark ages, had the ascendancy in Europe. As the toil of Mr. Spence in the pursuit of a favourite study has been great and long continued, we sincerely trust that his reward will be commensurate in the well-deserved success of the remarkable publication before us. We say remarkable, for we really consider it an astonishing effort of learning and assiduity. No where have we seen greater evidence of research, of care, of thought; and, upon the whole, we think we may say, of discrimination. We do not, however, consider the work

dextrous in arrangement, or always very felicitous in style. There is about it a want of continuity. The text is broken, and, in a great degree, made up of fragments; and the notes are too voluminous; while certain speculations, indulged in occasionally, though supported with great skill and plausibility, seem better adapted for the antiquary than the practising lawyer. The avowed object of the book is to describe the rise, progress, and establishment of equitable jurisdiction in the Court of Chancery. To do this satisfactorily, Mr. Spence has found it necessary in this, his first volume, to trace the history of our laws and institutions from their earliest beginnings to the present time; as preparatory to a treatise on their practical operation, to form, we understand, the subject of a second volume, which the much-respected author is engaged in preparing.

We have said that the work is not, in our opinion, very methodically arranged. The first volume, for example, anticipates some matter that ought properly to have been reserved for the second. This we consider an error, because it will be often difficult to understand the *practical* volume without reference to the *historical*. Nothing can well be conceived much easier than to have kept the two things perfectly distinct and independent of each other. Yet this Mr. Spence has not done, and he consequently gets every now and then into difficulties which call for awkward explanations. Thus, treating of Bankruptcy and Insolvency¹, he goes far beyond the limits of historical detail; setting out the enactments of the several statutes passed within the three last years, upon which, finding it impossible to do them justice by a commentary in *this* part of his treatise, he candidly confesses that "some of the provisions in these acts will not be intelligible without the explanations which follow in the subsequent parts of this work." We point this out prominently, at the outset, in order that it may be remedied in a second edition. Next to good matter is skilful arrangement. We shall have but few other faults to find.

The opening chapter of his work suggests a most interesting topic of inquiry,—namely, to what extent was the Civil

¹ Page 202.

Law introduced and established in this country during the long period of the Roman subjugation. Unfortunately the materials which exist to elucidate this subject are but little calculated to satisfy a rational curiosity. Mr. Spence, indeed, gives the following title to his first chapter: "The Judicial Tribunals of Roman Britain — Papinian — Ulpian and Paulus in Britain — Roman Municipal Institutions, and Roman Jurisprudence introduced." This promises a good deal; but when we come to examine the chapter itself, we do not find that any very valuable new light has been cast upon the subject by the learned author. He tells us, indeed, that —

"The judicial tribunals of Roman Britain appear to have been fashioned according to the Roman model.¹* Papinian, one of the most celebrated Roman Jurists, presided under Septimus Severus in the Forum at York²; and Selden thought it not improbable that Ulpian and Paulus, whose opinions and writings have to some extent influenced the jurisprudence of the whole of modern Europe, may have exercised the functions of assessors in the tribunals of Roman Britain."³

Now it is true that Papinian, Ulpian, and Paulus were contemporaries. They were the greatest lawyers of their time — and that time, according to some opinions, was the golden age of Roman jurisprudence. But that Papinian, Ulpian, or Paulus ever held judicial offices in Britain, we totally disbelieve. The thing itself is in the last degree unlikely; and there is not the slightest proof of it, unless the vague conjectures of Selden, to which Mr. Spence refers us, are to go for evidence. With respect to Ulpian and Paulus, it nowhere appears that either of those eminent jurists ever once set foot on the British soil. And as to Papinian, the most distinguished of this triumvirate, he was

¹ Whitaker, viii. § 1. In the Cod. Theod. xi. 7. 2. there is a declaratory law or rescript of Constantine as to the liabilities of Decurions, the chief municipal officers in the principal towns, addressed to Pacatianus Vicarius Britanniarum.

* How does this appear? There is nothing to show the fashion of tribunals in "Roman Britain." — *Ed.*

² Dion. C. lib. lxxvi.; Selden, Diss. in Flet. c. iv. § 3.; Camd. 627. ed. 1600.

³ Selden, *ubi sup.*

Præfectus Prætorio under the emperors Severus and Caracalla. In that character he was first minister of state, or rather what we should call grand vizier of the Roman world; being not only at the head of the army — but of the finance, as well as of the law. In every department of administration he represented the person and exercised the authority of the emperor.¹ To suppose such a functionary presiding in one of the local courts of an obscure and distant province, is about as reasonable as it would be to suppose Lord Cottenham and the Great Seal emigrating to dispense justice in New Zealand. That Papinian, in his ministerial capacity, accompanied Severus to Britain, and was with him at York in the last of his imperial progresses — we believe — because we have the fact (which is probable in itself), on sufficient authority. That, being here, he would have made it his business to improve the legal institutions of the country is what we might expect from his character, and is no more than what properly belonged to his office. York was then an important place; and Papinian might there, in the end of the second century, have followed the example afforded nearly two hundred years before by the emperor Claudius, who, we are informed by Tacitus², established a colony of professors at Colchester for the express purpose of instructing the barbarous natives in the mysteries of legal science. Accordingly the sagacious Blackstone, when puzzled to account for the *pars rationabilis* of our ancient law of personal succession, suggests that it might have been drawn from the Roman fountain “much earlier than the era of Justinian;” that is to say, some time in course of the four centuries during which this island was a province of the Roman empire. No doubt many valuable institutions and maxims are justly referable to that period of British history; for

¹ The *Præfectus prætorio* who immediately preceded Papinian was Plautianus, the favourite minister of Severus, whose daughter married the Emperor's eldest son. An idea may be formed of the rank and power of this dignitary from the fact that he had a hundred free Romans castrated (some of them married men, and fathers of families,) merely that his daughter on her marriage might be attended by a train of eunuchs worthy of an eastern queen. The great Papinian, a man of virtue as well as of ability, succeeded Plautianus, the legal profession opening the way to all the highest offices in the Roman Government.

² Tacit. Annal. l. 12. c. 32.

we hold it to be more than probable that our ancestors the Saxons found the Roman law in full operation on their first arrival in this country, in the year 450. . And we are not to suppose that they at once, or at all, put an end to it. The Saxon settlement was a work of time. It was not, like the Norman conquest, effected by a single blow. It was the result of a long-continued successions of invasion, by means of which, after a struggle of nearly 150 years, the Saxons found themselves at last masters of the country. This being the case, the notion of an instant and entire eradication of the Roman law is quite out of the question. Far more reasonable is it to suppose that the wild invaders, finding a rational and convenient system already established, gradually and insensibly adopted such parts of it as did not conflict with their own peculiar constitutions. If these views are correct, the common law of England, existing at the period when Alfred compiled his famous though now disputed *Dome Book* or *Liber Judicialis*, must have been deeply impregnated with the Roman jurisprudence.

In subsequent periods, doubtless great and mighty revolutions were effected in the political government, the civil, and more especially the criminal, jurisprudence — as well as in the judicial establishments which had existed under the Roman sway. But still we incline to think that the quiet under current of the private or common law of the land kept its deep and steady course, in its ancient channel, unaffected or but slightly disturbed by the storms which agitated its surface.

Holding, therefore, that the original stamina or substratum of our laws is of Roman fabrication, we quote from Mr. Spence the following instructive passages, which prove irresistibly that our ancestors, the Saxons, were constantly making fresh drafts upon the same copious fountain. After observing that the clergy were members of the Witan, or Grand National Council, he thus proceeds: —

“An important consideration is the high rank¹ which they enjoyed; but what, perhaps, is of the greatest weight is, that every

¹ The archbishops ranked with the royal family, or *Æthelings*; the bishop, with ealdermen, the highest rank of nobility. — Heywood on Ranks, p. 58. A person in holy orders enjoyed all the privileges of a thane, though the amount of the composition for his life varied according to his birth.

thing in the shape of literary or scientific acquirement was to be found almost exclusively amongst the clergy. Education was, so far as we can judge, entirely in their hands¹; and even at that early period it would appear that, in the schools at York, and other places², science was cultivated with considerable success. The science of the law was at that time an ordinary branch of study amongst the clergy. Amongst the other accomplishments of Aldhelm, bishop of Sherborn, A. D. 705, 709, and Wilfrith, of York, an acquaintance with the Roman law is expressly mentioned. Other dignitaries of the church of these early times might be added to the list of learned men³; Alcuin particularly shone conspicuous, in the court of Charlemagne, to which he was invited by that emperor, as one of the most distinguished scholars and jurists of his time.⁴ From the circumstance of their being the sole depositaries of learning, the secular clergy and the monks, during the whole of the Anglo-Saxon, and Danish, and Norman period of our history, became necessary to the people, high and low, in most of the ordinary transactions of life. If a will or an instrument of sale, gift, or exchange, or indeed any instrument ('*boc*,' '*geiorite*,' '*carta*,') were required to be drawn up, a priest or a monk was necessarily resorted to.⁵ The monasteries, as we know from what remains of their chartularies had, in the grants to themselves, precedents for almost every species of transaction relating to property; and the copies of the Gospels preserved in the different churches and monasteries were very commonly resorted to, as affording the safest depository for private charters, and the judgments of the ordinary tribunals.⁶ Those relating to the king were preserved in his own chapel.

"The priests had also important duties assigned to them by the

¹ In France, certainly. See Baluze, tom. i. p. 202.

² In Kent, Bede, iii. c. 18.

³ Bede, v. c. 8. 19.; Palgr. Rise, &c., p. 648.; Sharon Turner, iv. 426.; Ingram's Preface to Sax. Chron. xi.; Kemble, vol. i. p. 8.; Savigny, *Mid. A. l.* 297—299., "*Neque enim in parva temporum intervalla in hoc lectionis studio protelanda sunt, ei duntaxat qui sagacitate legendi succensus legum Romanorum jura medullitus rimabitur, et cuncta jurisperitorum secreta imis præcordiis scrutabitur,*" Aldhelm's Letter to Hadda; Malmesbury de Pontif. Gale, 341. There were schools for teaching Roman law in France from the time of Sigebert. Savigny, ii. 76.; Greg. Turon. iv. 47.

⁴ Lingard, i. 163, 4.; Turner. Savigny. Alfred, in his preface to the pastoral letter of Gregory, laments the decay of learning amongst the clergy in his time; he took energetic measures to revive it; Charlemagne did the same. Baluze, tom. i. p. 202. Some further illustrations of this subject may be found in Henry's Hist. of G. B. ii. 321—362.

⁵ See Palgr. Rise, &c. p. 204.; Kemble, vol. i. p. 65. 92.

⁶ Hickeys, Diss. Epist. p. 9. et v. *inf.*

law : to them it was especially committed, diligently as far as they could, to support every just right, and never to permit, if they 'could ameliorate it,' that any Christian man too greatly injure another, nor the powerful the weak, nor the higher the lower, nor the shire-man those under him, nor the 'Hlaford,' or Lord, his men or vassals, not even his 'thralls,' or cultivators¹; and every tribunal had a clerical president.

"The priests and monks alone were competent to undertake as advocates a legal discussion.² After the Norman conquest, when litigation was principally conducted before judges appointed by the king, at least down to the reign of Henry II., judicial offices in the king's court, as will be particularly noticed hereafter, were conferred almost exclusively on ecclesiastics; and members of this body, till a later time, following the example of their predecessors, sought and obtained considerable emoluments by embracing the profession of advocates before the legal tribunals.³

"Enough, perhaps, has been said to show that independently of all spiritual considerations, the clergy must have had great influence over the people of every degree; and that the reverence which the ancestors of the Anglo-Saxon converts had entertained towards their pagan priests⁴, was not likely to be diminished when transferred to the christian clergy. If we look to the kings or heads of the state, we shall find that, as regards them, the influence of the clergy and the pope, their then acknowledged head, was by no means inferior; indeed, it seems to have been from the first considered by the pope and his consistory of the first importance to secure the devotion of the Anglo-Saxon kings; and for this purpose they attributed to them the most flattering titles and high-

¹ Inst. of Polity, Anc. L. ii. p. 315. et v. ib. 313.

² Rhetores and Causidici attended the mycel synoth or great council (Hist. Eliens. p. 469.; and see the references Palgr. Rise, &c. 386.); and also no doubt the king's ordinary council. Some of the inferior clergy, by the study of the secular laws, became of sufficient consequence to be numbered amongst the Consiliarii Regis. Dug. Monast. i. p. 597. et v. p. 598. Though it seems the clergy and priests were expressly prohibited from taking any money for the performance of the duties incident to their sacred office, as for baptism, and the like, Canons of Ælfrie, Anc. L. ii. 353.—In the same canons, the question which was the subject of controversy between Lord Chancellor King and Mr. Selater is settled in favour of Lord King's notion. "They (priests and bishops) have one order, though the latter have precedence." Anc. L. ii. 349.

³ Malmesbury says, that in the reign of Will. II. there was "nullus clericus nisi causidicus." Parkes, p. 20. Innocent, iv. A. D. 1252, temp. Hen. III. prohibited this practice on the part of the clergy, Matt. Paris, 759, 60.; Addit. 1111, 1112. Probably from this time the inns of court, as colleges for the education of pleaders or barristers, may date their origin.

⁴ Tac. de Mor. c. 7.; Amm. Marcell. xviii. c. 5, 6. p. 417. ed. Gronov.

sounding prerogatives.¹ The Anglo-Saxon and Danish kings were not insensible to these favours; every monarch, from Ethelbirht downwards, conferred donations on the clergy, and especially the monasteries, with a profuse hand²; the devotion and gratitude of the Anglo-Saxon and Danish monarchs to the Roman See were farther evinced by frequent personal visits³, and there was a continual interchange of embassies, letters, and presents.⁴

"But direct evidence of the exercise of clerical influence upon the legal institutions is not wanting; all the codes, from that of Ethelbirht downwards, with few exceptions, bear decisive marks of the clergy having been the principal agents in their construction.⁵ This is particularly remarkable in the mild, impartial, and equitable spirit which pervades the code compiled under Canute after the conquest effected by his eminently ferocious and insolent countrymen.⁶ There is hardly, indeed, a single recorded act emanating from the royal prerogative by the advice of the council, or Witan, to which some of the bishops, very frequently abbots, do not appear as active parties."⁷ (p. 13.)

There is, therefore, something absolutely ludicrous in the

¹ Thierry, *Hist. of the Norman Conquest*, vol. i. p. 51—54. The king temp. Etheldred is called "*Christes Gespelia*," Vicarius, Wilkins, p. 113.; *Anc. Laws*, i. 341. This title, or rather *Dei Vicarius*, was continued down to the time of Bracton, fo. 5 b.—that is, when he did right; he was *minister Diaboli* when he did wrong; and see Allen, p. 13. 15.—Being *Christi Vicarius*, the king must have been the HEAD OF THE CHURCH. The king appears to have appointed and removed bishops at pleasure. Bede, iii. c. 7.

² Bede, i. c. 33.; Lingard, i. 197., particularly in the time of Ina, A.D. 694.

³ Ceadwalla, Bede, *Hist. Ecc.* v. c. 7. 20.; Offa, *Sax. Chron.* Gibson, 50.; Ina, ib. 52.; Siric, ib. 68.; Egbert, Æthelwlf, and Alfred, his son, who was consecrated as king by the Pope. *Sax. Chron. Ing.* A.D. 854, p. 94—6.; Canute, A.D. 1031, ib. p. 206. These journeys were followed by large donations to the church, Palgr. *Rise, &c.* 155. 9.; Asser. (*Annal. Gale*, p. 147.) asserts that persons of all ranks were accustomed to take these journeys. So Charlemagne made at least three journeys to Rome, Baluze, tom. i. 202.

⁴ *V. inst. al.* Bede, i. c. 32.; *Sax. Chron.* A.D. 890, &c.

⁵ See the Preambles, Wihtræd, *Anc. L.* i. p. 87.; Alfred, p. 46.; Ina, p. 103. &c.; Wilk. 14. 113. &c. In the laws of Howel Dha (compiled about A.D. 914, temp. Edward the Elder), the Roman law is expressly referred to, and M. Savigny (tom. ii. p. 102.) has pointed out in them a passage taken from the *Breviarium*, or *Cod. Just.* Howel took to his assistance not only his bishops, but a doctor in the law of the emperor; and went himself to Rome to have his code sanctioned by the Pope. *Anc. Welsh Laws*, i. p. 334. et v. *infra*.

⁶ Hickes' *Dissert.* p. 105. The Danes made the Saxons bow to them wherever they met; if a Saxon and a Dane met at a bridge, the Saxon must wait till the Dane had passed over. Their tyranny and insolence were extreme.

⁷ The evidence on these points will appear in subsequent pages.

commendation bestowed by Blackstone¹ on the ancient common law of England, for having, as he says, "so vigorously withstood the *repeated attacks* of the civil law." It did nothing of the kind; but, on the contrary, borrowed from the civil law enormously. Blackstone, indeed, does not deny that the basis of our legal system is Roman. But the great error of his sketch is, that he attributes infinitely too much to the northern buccaneers.

Perhaps Mr. Spence errs on the other side. We incline to think so. Thus we cannot, all at once, assent to his novel proposition, though ably maintained, that the feudal system, and our ancient law of tenures, came from Rome. But we proceed to notice an observation of Mr. Spence, that the laws of England, as portrayed by Glanville and Bracton, "are as different from those of the Anglo Saxons as if they had been the code of another nation." To explain this, Mr. Spence has devoted many learned pages. For our own part, we doubt the fact of this alleged difference. At all events, we receive it with much qualification. We do not believe that any material change had taken place at the time when Glanville and Bracton wrote on the common law, meaning thereby the private law of the land applicable to personal contracts and personal succession. And hence we conceive it was that Glanville and Bracton availed themselves of the Corpus of Justinian so profusely — but at the same time principally (we do not say exclusively) with reference to private rights and contracts. Glanville wrote 114, and Bracton about 200 years, after the Norman conquest. They both, truly, as regards *public law*, show a very different state of things from that which had existed under the Saxon or Danish polity. But the private law, by which we say again, we mean the precious relic of the Roman sway, had suffered, we apprehend, no material mutation. Indeed, the Conqueror, in the fourth year of his reign, had summoned deputies from all the counties of England (the noble, the wise, and the learned in the law), "*ut eorum jura et consuetudines ab ipsis audieret.*" Twelve men were accordingly chosen under the royal precept from every shire, who swore that

¹ 1 Comm. 64.

they would honestly and truly make such returns; and the laws and customs so declared by them were in due form sanctioned by the King.¹ Therefore, the Conqueror, so far from superseding, actually confirmed the common law; — while on the other hand, the revolution effected by him in the public form of government and general constitution of the country is, for violence and suddenness almost without a parallel in history. These distinctions being kept in view, we cannot help thinking that the puzzles of Mr. Spence are dispelled; and that an answer is furnished to his question, how it happens that the laws promulgated by the Anglo-Saxon kings have so little resemblance to those treated of by Glanville and by Bracton. We must remember that the regal laws of Alfred, of Canute, and of the Confessor, were almost all of them of a public character. But does this entitle us to infer that the private law under those monarchs was necessarily and substantially different from the private law in the time of Glanville and Bracton? On the contrary, we are mightily disposed to believe that the private, customary, unwritten law, was preserved for its inherent excellency, and followed by the bulk of the community — especially by the inhabitants of towns², which our learned antiquarians (Mr. Spence included) agree were the chief conservators of the ancient common law. Had that venerable system been treated of by any private lawyer under Alfred or Canute — we might have had a work, not indeed, like Glanville and Bracton, borrowing largely from the Corpus of Justinian (for that collection had practically, if not entirely, disappeared in the long night of universal darkness which had spread over the world), but a work full of prin-

¹ Rogeri de Hoveden Annales, 601. (in Savili rerum Angl. Scriptores post Bedam); Ingulphi Historia in do., p. 914.; Wilkins, Leg. Angl. Sax. p. 229. lex 63. See also prefatio ad Leges Gulielmi Conquestoris, p. 212.; Quantum ad Secundum, &c. The Conqueror was not indifferent to the opinion of his new subjects. He studied all the arts that were consistent with his iron policy to gain popularity. This sanction of the ancient Saxon laws is not the only evidence of his desire to stand well with the people. He made an effort to acquire their language, but made little progress in it; having, as the chronicler informs us, begun it too late.

² The unbroken continuance of the Roman character in our English Municipia has, we think, been completely established. See Appendix to Mr. Cathcart's Translation of Savigny.

ciples and doctrines which could at once have been referred to a Roman original. How otherwise shall we account for the treatises of Glanville¹ and Bracton being so full of civil law? Those eminent jurists did not alter the law of England, but took it as they found it. What rational inference then can be drawn, but that the system to the expounding of which they devoted their learned lives corresponded, and in the main was identified, with the system from which they derived their illustrations. In short, the use made by Glanville and Bracton of the Justinianean Corpus, is to our minds proof satisfactory that the private law of this country in the twelfth century was essentially Roman; and if this were so, there is, we conceive, no other way of accounting for the fact but by supposing *that* law a rich legacy bequeathed to us by our imperial masters. The resistance to the Roman jurisprudence, so often and so vauntingly adverted to by Blackstone, did not seriously begin till the establishment of the Inns of Court, and these are generally referred to the reign of Henry III.

In treating of the obsolete jurisdiction of the Court of Chancery, Mr. Spence mentions one article, of which we regret the relinquishment, and of which we should be happy to see the resumption. The passage is as follows:—

“*Divorce*: Tothill in his transactions of the Court of Chancery² states, that there are on the Rolls of the Court two decrees for *divorces* (but of what description he does not mention) in the time of Henry VIII., and two in the time of Elizabeth, after verdicts in the Court of King’s Bench, I presume for adultery. I have been unable to discover them, even with the help of Mr. Munro. It is not unlikely, however, that the Court of Chancery, under its clerical chancellors, exercised jurisdiction to decree a divorce, a *vinculo matrimonii*. That jurisdiction is exercised by the Court of Chancery in America³, and it was probably carried over there from England.”

The report in Tothill is obscure. We do not collect from it that two decrees for divorce were pronounced in Chancery

¹ Of course we are not ignorant of the controversy respecting Glanville’s authorship of the work ascribed to him.

² Page 61. ed. 1649; p. 124. ed. 1671.

³ See Parkes’ New York Revised Statutes, p. 76.

"in the time of Henry VIII.," and two "in the time of Elizabeth." The extract is important as well as brief, and our readers may judge for themselves : —

" *The transactions of the High Court of Chancery.* — Goodman *contra* Kinnerley, Jennings *contra* Blunt, Read *contra* Rawlins, Nicholas Scot in the second part of Judgment Roll, H. 8., and in the same Roll two decrees for divorces, Terrel and his wife, Jefferey and Jenny.

" After verdict in King's Bench, Moor and Taylor, 29 Eliz. ; Some and Poyntell, and Hoskins and Perry, 26 Eliz."

What all this means, it seems to us not very easy to say. In our humble judgment it amounts to no more than this, that in the second part of the Chancery Judgment Roll; temp. H. 8., two decrees for divorce are recorded. The *three* cases, (not *two*, as stated by Mr. Spence) in the 26th and 29th Eliz., "after verdicts in the King's Bench," are not given by Tothill as divorce cases. And we think it extremely unlikely that they were of that description. For we apprehend the proceeding at law, upon which verdicts were had, could not have been by the husband against the wife, and as to an action for damages against the paramour, we doubt whether the first example of that species of redress was not the Duke of Norfolk's case against Sir John Germaine, in the year 1697. However, the report of Tothill, such as it is, proves that divorces of some sort were anciently granted in Chancery. We confess we should be very glad to see the remedy restored to that tribunal.

We apprehend the most useful and interesting portion of Mr. Spence's volume is that (the second branch of it) which professes to describe the rise of equitable jurisdiction in this country. His views upon this subject appear to us to be sound and very deserving of attention. He holds, in common with all our learned antiquarians, that the stream of justice flowing originally from the crown — equitable or suppletory jurisdiction was exercised in the first instance by the sovereign in person. It next became vested in the council, and passed thence, by a gradual and insensible transmutation, to the chancellor, not much before the reign of Edward IV. Thus equity may be said to be coeval or nearly coeval with the common law itself ; although the dispensation of it was

not exclusively vested in the Court of Chancery till about four centuries ago. According to Mr. Spence, not only had the jurisdiction become permanently lodged in this tribunal — but the forms of procedure were at this time adjusted on their present foundation :

“ In the reign of Edward IV., proceedings by bill and subpoena became the daily practice of the Court of Chancery¹; and from that time, though the judges continued to dispute the Chancellor's authority to interfere with the proceedings of the Common Law Courts², we do not trace any further opposition on the part of the commons to the authority of the Court of Chancery³; and down to the reign of Charles II. the Court continued to be substantially the same as it was in the reign of Edward IV.” (p. 349.)

So far our position is secure. There is no doubt the equitable jurisdiction of the court as an independent tribunal, (acting by its own authority, and not by delegation from the Court of Parliament or Privy Council,) can be safely carried back to the reign of Edward IV., or perhaps indeed to the time of John of Waltham. But when Mr. Spence says, that “ the court continued substantially the same ” till the reign of Charles II., every reader will demur to his proposition. In fact, we are at a loss to know what the learned author means. It is very easy to say that the ecclesiastical chancellors knew the civil law. But our impression is that the lay chancellors of Queen Elizabeth and of the first two Princes of the Stewart line did more to fix the character of technical equity, *as now understood in this country*, than all the ecclesiastics put together. To suppose that the court did not advance, and that too with gigantic strides, under Sir Nicholas Bacon, Lord Ellesmere, Lord Bacon, and Lord Coventry⁴, is to suppose what is contradicted by its own records, as well as by contemporary reports. It was, in fact, peculiarly in a transition state during the very period that

¹ 3 Bla. Comm. i. p. 53.; Palg. Coun. 97. In some cases the parties were referred to Parliament. Crompt. 46 b.

² Y. B. 9 Edw. 4.; 22 Edw. 4.; Crompt. 41 b. &c.

³ Palg. Council, 97.

⁴ “ Lord Coventry was very able, and contributed a great deal towards modelling the Court of Chancery.” Per Lord Hardwicke, Life of Lord Kames, vol. i. p. 246.

Mr. Spence represents it to have been stationary ; for it was not till the close of Lord Nottingham's career that the boundaries of equitable jurisdiction became settled ; and the process of so adjusting them commenced with a lay chancellor, Sir Thomas More.

It appears that in the time of Sir Francis Bacon, the Court transferred cases of delinquency to the star chamber, which in those days (as Sir Edward Coke pithily informs us), "kept all England quiet."

"The Court of Chancery," says Mr. Spence, "besides itself granting relief, made use of the Court of Star Chamber to subject the parties to punishment where gross frauds had been perpetrated. Thus we find an order of Lord Keeper Bacon to this effect : 'Because the Court disliketh the said evil practices and fraud, and thinketh them not meet to be passed over without further examination ; it is ordered that the plaintiff and one Frankland shall at their equal charges exhibit a bill in the Court of Star Chamber against Fulwood the defendant, 'touching his indirect lewd and fraudulent practices.'"¹ (p. 351.)

¹ Reg. Lib. B. 1579. fol. 479. In the case of *Fysher v. Fysher*, 25th Oct. 1594, almost every kind of charge is brought against the plaintiff, including fraud, cosenage, imposition, intimidation, and outrage. Amongst the rest it was alleged that he, on his meeting Serjeant Heale, and again on meeting Mr. Crewe, the counsel who had spoken against him in the cause, had presented a pistol to their bosoms ; that he had forged an order of the court, and exhibited an affidavit into the Court to be publicly read, being in manner of a libel, purporting very foul and unseemly matter against his sister, and the defendants his uncle and brother ; "and it was now offered to be deposed by Dr. Helme that the plaintiff did heretofore, not only with most vile and opprobrious terms revile, and draw his rapier upon his natural father," and that he had used certain blasphemous expressions (which are detailed verbatim) ; and lastly, because the Marquis of Winton and the Lord Sondes, and divers Knights and Justices of the Peace, of good credit, had certified to the Lord Keeper of the lewd and bad behaviour of the plaintiff, (it is by mistake defendant in the order,) the Lord Keeper ordered that he should be taken in custody by the Warden of the Fleet, and brought into the Star Chamber, to be informed against, *ore tenus*, by her Majesty's counsel, for all such of the aforesaid offences as are there punishable ; and all parties, except the Serjeant and Mr. Crewe, were to be examined on interrogatories as to the aforesaid offences, in order that their depositions might be shown to her Majesty's Council to instruct them, and also to be showed to the Court of the Star Chamber ; and Mr. Serjeant Heale and Mr. Crewe were ordered to attend the Star Chamber, and to inform their knowledges upon their credit touching the said abuses to them offered, and the plaintiff was or-

The following is Mr. Spence's curious account of the creation and suppression of the "Court of Requests" — a tribunal specially established for the benefit of the poor. He supposes it to have originated in an order of the 13th of Richard II., regulating the council — by which order,

"The Lords were to meet between eight and nine o'clock, and the bills of people of lesser charge were to be examined and despatched before the Keeper of the Privy Seal and such of the council as should be present for the time being. From this time at least the Lord Privy Seal held a court of equity, called the Court of Requests. The course of procedure was the same as in the Court of Chancery. The bills ordinarily contained one or the other of these two suggestions, namely, that the plaintiff was a very poor man, not able to sue at common law, or that he was one of the King's servants, or ordinarily attendant on his person: it was the poor man's Court of Equity.¹ The Lord Privy Seal and the Master of the Requests, who exercised similar functions to those of the Masters in Chancery, presided. This Court continued to be resorted to down to the 41st Elizabeth, when it ceased to exist, having been virtually abolished by a decision of the Court of King's Bench.² Greater facilities were from that time given to the poor for enabling them to proceed in the Superior Courts, *in formâ pauperis*, which will be noted hereafter in treating of the course of procedure in the Court of Chancery." (p. 352.)

We would direct particular attention to a chapter of Mr. Spence's (p. 355.) on the different "Officers of the Court from the Time of Richard II. down to the End of the Reign of Charles I." It is both entertaining and instructive; and is, we think, one of the best in the book.

As a favourable specimen of Mr. Spence's method, we may cite his observations upon mortgages. These he of course

dered to find sureties to keep the peace. Moreover, Dr. Helme was commanded to inform the Archbishop of Canterbury of the aforesaid blasphemous speeches of the plaintiff, to the end he might be dealt with as the Lord Archbishop should think meet. — Reg. Lib. A. 1594, fo. 442.

¹ The Lord Keeper, "moved with compassion towards the poor man, applied to the Master of the Requests to take order of a suit instituted in Chancery to be relieved from mistake." Reg. Lib. 5 & 6 Eliz. fo. 471.

² Palgr. Coun. 79. 99.; and see stat. 16 Car. i. c. 10.; Seton, p. 18.; 4 Inst. 97.; 3 Bla. Com. 50., Christian's note.

deduces from the Roman law, which divided them into two kinds, the *pignus* and the *hypotheca*; the former where the thing pledged was delivered, the latter, where it was not delivered, but stood upon contract, tacit or expressed. Mr. Spence states the rules of the Roman law, remarking that

“The property, whether movable or immovable, was considered merely *as a security*. On the money being repaid, the creditor was bound to restore the thing pledged.”¹ (p. 600.)

Now let us turn to the law of England on the same point. Mr. Spence thus states it:—

“According to the ancient practice, when a person had forfeited a pledge of a chattel or real estate, and the contract was that on nonpayment on a certain day, the thing was to be forfeited, on nonpayment, the thing pledged *was absolutely forfeited*.” (p. 601.)

According to this account, then, the two laws were directly opposed to each other, and this, too, be it observed, on a matter of the greatest importance, constantly occurring in the business of life. Now we rather wonder it did not occur to Mr. Spence to state that this law of forfeiture, which he correctly represents to have been the ancient practice of England, was, at one time, also the law of Rome, where it was known by the familiar title of *pactum commissorium*, or *lex commissoriæ*. It was adopted in this country and in Scotland most probably during the period when the entire island was in the hands of the Romans, and it was adhered to by our common law, as well as by the common law of Scotland, long after it had been in the case of mortgages rescinded and forbidden by the imperial legislature. And this we cite as another proof (which has struck us in putting these observations together) of the position already advanced, that our ancient private law was not only of Roman manufacture, but was introduced and established during the period of the Roman dominion in this island.

Before dismissing the subject of mortgages, we may advert to a fact well deserving of Mr. Spence's attention, namely, that the equity of redemption was not admitted in this

¹ Dig. xx. 4. 12; Cod. iv. 24. 11; *ib.* viii. 18.

country till the 17th century,—in other words, not until the race of spiritual chancellors had long passed away.

We now, however, conclude our notice (we do not call it a formal review) of this valuable treatise, which, we think, must add much even to the high and well-established reputation of Mr. Spence. As a repertory of juridical antiquities, it is perfect,—embracing, as it does, the history as well of the common law as of equity. And even where we may not agree with the writer's opinions, we are not the less indebted to the diligence, the candour, and the profound erudition which he invariably exhibits as a guide to our inquiries. Nor is he to be regarded as at all destitute of useful and instructive practical information, to which, notwithstanding a defective arrangement, reference may easily be had by the help of an index and table of contents, unusually copious and complete. To all, therefore, who desire to study the law scientifically,—to all, in short, who regard their profession as something better than a money-making trade,—this volume can hardly fail to prove acceptable, as an important accession to our legal literature, and an honourable and enduring monument of the learned author's talents and acquirements.

ART. XII. — WIFE'S REVERSIONARY INTEREST IN CHOSSES IN ACTION.

THERE are few subjects which have occasioned more discussion, or given rise to a greater number of judicial decisions in modern times, than the power of a husband over *the choses in action* of his wife not reduced into possession, and over her equitable, reversionary, or contingent interests in chattels personal. As a general result, the cases of *Mitford v. Mitford*¹, *Hornsby v. Lee*², *Purdew v. Jackson*³, *Honner v. Morton*⁴, *Stamper v. Barker*⁵, and others, have established

¹ 9 Ves. 87.

⁴ 3 Russ. 65.

² 2 Madd. 16.

⁵ 5 Madd. 157.

³ 1 Russ. 1.

the unqualified right of a married woman surviving her husband to all her *choses in action* not reduced by him into possession, and to her reversionary and contingent interests in personal chattels, not vesting in possession during the coverture, against the assignee of the husband, whether claiming by particular assignment for valuable consideration, or as his general assignee under the bankrupt or insolvent acts. In the reports of these cases, it will be seen that the learned and eminent judges by whom they were decided, do not recognise any distinction between reversionary interests, which may possibly vest in possession during the coverture, and those which then only vest after the husband's death; nor do they recognise the power of this court, on the consent of the wife in court, to transfer that right, which it holds to be otherwise incapable of assignment by him, either with or without her concurrence.

Such is the rapid view taken of the subject before us by the present Chief Justice of Ireland, when Master of the Rolls, in the case of *Box v. Jackson*¹, for the decision of which his lordship's aid was requested by the Lord Chancellor Sugden. It may be right, however, to observe, that though Lord Lyndhurst's decree in *Honner v. Morton*² was in strict accordance with the foregoing statement of the result of the decisions, there is a passage in his lordship's reported judgment which appears, with all deference to so high an authority, to contain in it the germ of much error. Thus speaks his lordship: — "When I consider the principle which I originally laid down, that where a husband assigns an interest belonging to his wife, and thereby agrees to do every thing in his power to make that assignment effectual, the assignment will be valid against the wife only in those cases in which he is *able* to reduce the thing into possession — when I further find that principle supported by the opinions expressed by Sir William Grant, and by two distinct decisions of Sir Thomas Plumer — and when I find, on the other side, no opposing decisions; — I confess I revert to my original opinion, — the opinion which I should have pronounced if the subject had been untouched by authority, — that the husband has no power to

¹ 1 Drury, 42.

² 3 Russ. 65.

give effect to a conveyance of property of this description, unless circumstances so turn out as to have put him in a situation which enabled him to have reduced the *chose in action* into possession. If, at the time of the assignment, he is in a condition to reduce the chose in action into possession, the assignment operates immediately; if he is afterwards in a condition to reduce the thing into possession, the assignment will then have full effect; but if he dies before the event happens on which the chose in action may be reduced into possession, the assignment becomes altogether inoperative." It is to this last sentence that our objections chiefly apply; and we humbly conceive that the husband's *ability* to reduce the chose in action into possession, is no test whatever of the sufficiency or effectiveness of the assignment. We apprehend that nothing short of actual and positive reduction into possession will bar the wife's right by survivorship to the full enjoyment of her chose in action. If, in Lord Lyndhurst's language, the husband is at the time of the assignment *in a condition* to reduce the chose in action into possession, then we allow that the assignment has an inchoate or inceptive validity, which may by possibility be afterwards matured into completeness, in those cases where the chose in action is capable of falling into possession during the coverture. But where, either by the course of nature, or of events, the chose in action cannot be, or is not, reduced into possession during the coverture, and the wife survives her husband, we apprehend it to be an indisputable proposition that the wife's rights revive in full force upon the determination of the coverture, and the assignee, whether general or particular, of the husband is wholly barred, irrespective of all considerations touching the original ability or disability of the husband to reduce the chose in action into possession. Were it otherwise, the wife's reversionary rights would be barred by the husband's assignment in all those cases, where either *ab initio*, or by subsequent events, the means exist (though they may not be exercised) of reducing her rights into actual possession during the coverture. Whereas nothing is more clearly laid down, and even by Lord Lyndhurst himself, in the judgment in *Honner v. Morton*, than the proposition that the husband "cannot make his own title perfect unless he reduces it into

possession." The law, however, upon the subject of a feme covert's choses in action, present and reversionary, appears now to have received the most ample consideration and adjudication, and to be thoroughly well established upon known and definite principles. It fortunately lies, also, within a compass of a few leading cases, which may be soon read and mastered by the student, while the weight of authority which the decisions in question derive from the great names of Eldon, Grant, Plumer, Leach, Lyndhurst, Cottenham, and Sugden, is of the utmost value to the practitioner. But though the law upon the subject before us may be settled, we doubt whether the settlement has assumed that form which would have been most convenient and satisfactory to the public. It will be remembered that, in the short-lived Real Property Act of 1844, there was originally contained a clause which was intended to set aside the existing law as founded upon the decisions of Courts of Equity, and to confer upon the husband of a feme covert the absolute power to dispose of all her chattel interests, whether present or reversionary in personal estate. This would, in our apprehension, be a good and serviceable amendment of the law, which we hope will not be long delayed; and we have good ground for believing that such a change would be highly approved by the very learned judge, whose talents and learning have for the last few years adorned the highest seat of judicature in Ireland.

We shall hereafter give a quotation from Sir Edward Sugden's judgment in *Box v. Jackson*¹, to support this conjecture. In the mean time, that case affords an indication that every struggle will be made to surmount the barrier, which the present state of the law opposes to the powers of a husband over his wife's reversionary interest in personal estate. In that case, it was attempted to give effect to an assignment of a wife's reversionary interest, by means of an offer on her part to waive her equity, and to submit to an examination in court for the purpose of signifying her consent to the transaction. A trust-fund stood settled in trust

¹ Drury, 42.

for Edward Box for life, with remainder to his wife for life, with remainder in trust for their children as Edward Box should appoint; and, in default of appointment, to the children equally. There were issue of the marriage three daughters, one of whom was the wife of John Wilmot. Edward Box died without exercising his power, so that the daughters stood entitled to the fund in equal shares, subject to their mother's life interest. The bill was filed by the widow and her two unmarried daughters, and Mr. and Mrs. Wilmot, against the trustee; and it prayed, that under a written consent to that effect, dated in February, 1834, and signed by Wilmot and wife, and the other two daughters, those parties and the widow might be declared absolutely entitled to the fund; and that the trusts of the settlement might be declared to be at an end, the plaintiff, Elizabeth Wilmot, consenting by the bill to waive her equity in favour of her husband and the widow; and also praying that the fund might be transferred to the widow. By Elizabeth Wilmot's offer to waive her equity, it was understood that she proposed to submit herself to an examination in court, and thereupon to give her consent to the execution of the agreement. The question thus arose, whether the court could give effect to such a consent, so as to bind Mrs. Wilmot's reversionary right in case she should happen to survive her husband before it vested in possession. The plaintiffs insisted that this could be done, and that there was authority to warrant the court in making a decision accordingly, by analogy to the practice of examining a married woman before passing a fine of her real estate. In support of this view, the plaintiffs relied upon *Woollands v. Croucher*¹, *Doswell v. Earle*², and *Howard v. Damiani*.³ On the other side, *Purdew v. Jackson*⁴, and that class of cases were cited as conclusive against the plaintiffs. From the importance of the case, Lord Chancellor Sugden called to his aid the Master of the Rolls, from whose able judgment we take the following extract: "Whence, then, does this court derive the right to ascribe this efficacy to her consent? Has it any inherent power to

¹ 12 Ves. 174.² 12 Ves. 473.³ 2 Jac. & W. 458. n.⁴ 1 Russ. 1.

take the consent of a married woman in person, and to bind her right by it? I am aware that it has been asserted; and that opinions have prevailed, that the court possesses and exercises such a jurisdiction by a sort of analogy to the proceeding at common law, in which the Judge examines a married woman before she is permitted to levy a fine of her real estate. In my opinion, the cases are so widely different, that if there was no authority on the subject, I should say that it was impossible to give to the bare act of her consent, in this court, an effect the same as that of her consent and of the fine subsequently levied. The fine it is that binds her at common law: and there her consent on examination before the Judge has, of itself, no operation. But to show that no such jurisdiction exists, I shall refer to authority. (His honour here cited, and made quotations from the cases of *Fraser v. Baillie*¹, *Sperling v. Rochfort*², *Pickard v. Roberts*³, and *Richards v. Chambers*⁴), . . . If there be no general jurisdiction by which this court can bind the contingent and reversionary rights of the wife, and its rules and practice, by which it allows her to waive her equity applicable to a case like the present? It appears to me, both on reason and authority, we should pervert that practice were we to apply or extend it to any subject but that which is well known as the wife's equity. Her rights to her *choses in action*, and to her reversionary equitable rights in personal chattels, which are not reduced into, and do not vest in, possession during the coverture, vest in her by law without her consent; and the same law which gives her the property, disables her from disposing of it. To receive and act upon her consent here, would be to defeat her right and the policy and reason of her disability: but her equity is the creature of this court, and governed altogether by rules applicable to it, and to no other species of right. It is not founded on contract. It owes its existence to the arbitrary interference of this court. . . Without adverting to other peculiarities of this species of right, I may say that it is anomalous, wanting many of the incidents of property; and that it would be subversive of the established

¹ 1 Bro. CC. 517.³ 3 Madd. 385.² 8 Ves. 174.⁴ 10 Ves. 588.

policy of the law to make this peculiar and qualified right of waiving a benefit, proffered to her by this Court, an argument or precedent for enabling her to defeat those rights, with which the common law has, while married, inalienably invested her."

Lord Chancellor Sugden: "The point to be decided is, whether, by analogy to a fine at common law, this Court hath power to take the consent of a married woman, and, by force of it, to give effect to a transfer by her of her equitable reversionary interest in stock. It would be strange if such a jurisdiction did exist, that it should never have found its way into a single text-book of authority. I am prepared to follow the authorities in whatever way they have decided the point; and I should not have been surprised, considering the manner in which this Court has dealt with the rights of married women, if I had found it settled that a married woman's consent could be taken in a case like the present The doubt which pressed upon my mind, when this case was first mentioned before me, was whether the Court in former decisions did not intend to distinguish between cases arising upon settlements, (where the interest of the wife was created by contract, and depended upon her surviving her husband, and where, therefore, the husband could never enjoy the wife's interest, and the giving effect to the wife's consent would enable the husband to defeat that contract,) and cases where the wife's interest was given by birth, independently of contract, and was, moreover, not dependent on her surviving her husband." His Lordship then took a masterly review of the cases, and thus proceeded: "In reviewing the authorities, if we class them, and look at those which are opposed to the existence of this power in the Court, it will be seen that, great as the difficulty has been, there is not one of them which has been ever denied, or even doubted, by any succeeding judge: *O'Keate v. Calthorpe*¹, before Lord Hardwicke; *Frazer v. Baillie*², before Mr. Baron Eyre; *Sockett v. Wray*³, before Lord Alvanley; *Nevison v. Longden*⁴, before the Court of Exchequer; *Sperling v. Rochfort*⁵, before Lord Eldon; *Richards v. Chambers*⁶, before Sir

¹ 8 Vess. 177.

⁴ 8 Ves. 173.

² 1 Bro. CC. 517.

⁵ 8 Ves. 164.

³ 4 Bro. CC. 483.

⁶ 10 Ves. 580.

William Grant; *Sturgis v. Corp*¹, before the same Judge; *Lee v. Muggeridge*², also before him; *Pickard v. Roberts*³, before Sir John Leach; seven of them being actual decisions, and the remaining two, great authorities as to doctrine; all remain untouched by a single dictum or decision; whereas if we look to the cases on the other side, *Nieman v. Cartoney*⁴, *Macarmick v. Buller*⁵, *Ellis v. Atkinson*⁶, *Guise v. Small*⁷, *Hewitt v. Crowcher*⁸, *Gregg v. Crowcher*⁹, *Woollands v. Crowcher*¹⁰, *Howard v. Damiani*¹¹, all have been found fault with, and have been either expressly overruled, or shown not to have been of authority. I have no hesitation, therefore, in coming very clearly to the conclusion, that the Court has no jurisdiction to do what the plaintiffs seek, and that the bill must be dismissed. I am particularly glad to have had the assistance of his Honour, as it will, I hope, give so much weight to the decision in this case as to set the question at rest, and preclude any further discussion on the point.

“Before I conclude, I wish to say a few words as to the husband’s right to dispose of the wife’s reversionary choses in action. The cases of *Purdew v. Jackson*, and *Honner v. Morton*, which have been followed by Sir John Leach in *Watson v. Dennis*¹², and by the same judge in *Stamper v. Barker*¹³, and by Lord Cottenham in *Stiffe v. Everitt*¹⁴, — about the doubt in which last case, however, I express no opinion whatever, as it is not before me, — these cases have established that the husband cannot, even for valuable consideration, assign the wife’s reversionary *choses in action* so as to bind her surviving.¹⁵ But though that is settled now, I have no hesitation in saying that before those cases the law was considered by the Profession to be the other way. Sir William Grant began the doubt, and Sir Thomas Plumer, though he held in the first case, *Johnson v. Johnson*¹⁶, that the particular assignee was entitled, yet in *Hornsby v. Lee*¹⁷, he decided the other way; and he followed that decision in

¹ 13 Ves. 190.² 1 Ves. & B. 118.³ 3 Madd. 384.⁴ 3 Bro. CC. 347 n. Ibid. 568.⁵ 1 Cox, 357; 8 Ves. 174.⁶ 3 Bro. CC. 365., 2 Dick. 759.⁷ 1 Anstr. 277.⁸ 12 Ves. 175.⁹ Ibid. 175.¹⁰ 12 Ves. 174.¹¹ 2 Jac. & W. 458 n.¹² 3 Russ. 90.¹³ 5 Madd. 157.¹⁴ 1 Mylne & Cr. 37.¹⁵ *Ellision v. Edwin*, 13, Sim. 309, *Ashby v. Ashby*, 1 Collyer, 553.¹⁶ 1 Jac. & W. 472. ¹⁷ 2 Madd. 16.

Purdew *v.* Jackson, by deciding that the husband's assignment could not bind the wife surviving; and he admitted no distinction between a particular assignee claiming under an assignment for valuable consideration, and a general assignee claiming under a bankruptcy or insolvency; and though that was contrary to the law as it was then understood, yet, if my decision in this case be sound, it places the doctrine on this basis, that the husband cannot bind the wife's reversionary interest in personalty, either with or without her consent. I am glad to observe, however, that in the cases of *Donne v. Hart*¹, and *Major v. Lansley*², the Court has refused to extend the doctrine to chattels real. I think the doctrine has been already carried far enough, and ought not to be extended."

ART. XIII.—LORD CHIEF JUSTICE TINDAL.

THE grave has closed over and extinguished another great light of the law—one of the most upright and amiable men that ever adorned the Bench of England. It is a mournful, but needful duty, to record a few of the leading passages in the life of this distinguished magistrate.

Nicolas Conyngham Tindal was born at Chelmsford in the year 1776. His father was a respectable solicitor in that town, and enjoyed the confidence and respect of many families in the county of Essex—among others, of Lord St. Vincent's. After receiving the elements of his education at a private school, the young man was sent to Cambridge and entered of Trinity College. He applied with success both to mathematical and to classical studies, taking a high degree in each department—for he was fifth wrangler and first medallist.

On coming to London he was entered of Lincoln's Inn, and after studying pleading under Mr. Serjeant, afterwards

¹ 2 Russ & M. 360.

² 2 Russ. & M. 355.

Mr. Justice and Mr. Baron Bayley, for three years, he became himself a pleader under the Bar. In this laborious but useful branch of the profession, he continued for some years, and had many pupils, some of whom afterwards rose to great distinction, and have been raised to the Bench. He was called to the Bar in 1809, and joined the northern circuit, which he travelled in the autumn of that year along with Mr. Brougham, who had been his pupil, and was called to the Bar the year before. For some years Mr. Tindal's business was scanty, either on the circuit or in town. He had never attended sessions, and the northern circuit is so numerous that mere pleading connexions do not give a sure passport to speedy business. But in the course of a few years, his merits became known, both by the useful and unassuming aid which he lent to his leaders on the circuit, and by the ability and learning of some arguments which he held in the court of King's Bench. The first occasion on which he greatly distinguished himself, was the famous Wager of Battel in Abraham Thornton's case. His very learned argument on this question, gave rise to the Act brought in by Sir Samuel Shepherd, then attorney general, for abolishing that barbarous and absurd mode of trial.

The next cause of importance in which he appeared was the Queen's case, in the House of Lords. He was the junior Counsel all but one, he being fifth, and his successor on the Bench, Mr. Wilde, now Chief Justice, the sixth. Mr. Tindal greatly distinguished himself by his able and judicious conduct on this great occasion. It was a saying of the leaders, Messrs. Brougham and Denman, so little feared they their adversaries, that they would engage to affirm either of their two juniors, Tindal and Wilde, could run round them any day. The Queen's counsel, six in number, have all now been raised to the Bench, Messrs. Brougham, Denman, Williams, Lushington, Tindal, Wilde.

The attention of Lord Liverpool was directed to Mr. Tindal's merits, not merely on that trial, but on an important case argued before the Lords of his board of Treasury—that of the Deccan prize-money. The high and just estimate which his Lordship formed of his talents and his capacity for business, led to an offer of a seat in Parliament, preparatory to his

taking legal office under the Government. Accordingly he came in for a seat of the Southern Scotch Burghs, in 1824; and he bore a part in the debate in the great case of *Smith the missionary*, when brought forward by Mr. Brougham,—a case to which mainly is ascribed the final emancipation of the slaves. Mr. Tindal hardly consulted his usual prudence in selecting this for his first appearance in Parliament—but his success was commensurate with his moderate wishes—though he afterwards more fully displayed his great good sense, his accuracy of argument, and his legal knowledge.

When, upon the death of Lord Gifford, Sir John Copley, attorney general, succeeded to the rolls, Mr. Tindal was appointed solicitor general—not having before had a silk gown. Hence he became placed in an awkward position, for he gave up his extensive practice as a junior, and did not possess the peculiar talents, nor had he the experience, which fits men to lead causes. Accordingly his friends were aware that, had any reverse of fortune befallen the ministry with which he was connected before he should be raised to the bench, his professional business must sink to a moderate compass.

In 1827, the elevation of Lord Lyndhurst to the Great Seal occasioned a vacancy in the representation of Cambridge University. Sir N. Tindal was proposed to fill it, and he defeated Mr. W. J. Bankes, the opposing candidate, by a majority of 479 to 378. He had, at the general election of the preceding year, been returned for Harwich.

He was always a safe, if not a very powerful or brilliant leader, and when the attorney general was in the same court with him, his valuable assistance could always be secured to a party retaining him with his leader.

This happened very soon after he became solicitor general, and afterwards happened a second time—for on the formation of the Junction Government (as it was termed) under Mr. Canning in April, 1827, Mr. Scarlett was made attorney general; and Sir C. Wetherell returned to office in June 1828, after Mr. Canning's death. Then in consequence of the Catholic Question being brought forward by the government early in 1829, Sir Charles, with that chivalrous devotion to his principles, which has ever distinguished him in his whole career, political and professional, threw up his

office. Sir James Scarlett again passed over Sir N. Tindal's head and became attorney general.

Men were found to carp at these proceedings, and to say that the solicitor general ought not to have three times suffered others to pass over his head into the first office. The remark is wholly without just foundation. Sir J. Scarlett had been a leader on the northern circuit, and in Westminster Hall and Guildhall before Mr. Tindal was called to the bar, and it was absurd to suppose that the latter should harbour the least jealousy of his going over his head in 1827. But in truth this is the only one of the three instances that can give rise to the smallest discussion. For in January following Sir C. Wetherell only returned to the place which he had quitted, and could not possibly be solicitor under his former solicitor. In like manner, when Sir Charles retired the year after, he was succeeded by Sir J. Scarlett, who could not return to office under Sir N. Tindal.

However, all difficulties both imaginary and real were terminated in a few months after this last change by the retirement of Lord Wynford, then Chief Justice Best, from the Common Pleas; and he was, with the universal assent of the profession, succeeded by Sir N. Tindal, who held the office from the summer of 1829 till his late lamented death.

In considering the high merits of this eminent lawyer we are to regard first his forensic and then his judicial life.

As an advocate he did not rank very high. He had never distinguished himself as a leader, and his value to those who did fill that station consisted in his diligent study of each particular case intrusted to him, the correctness of his judgment on its conduct, and the soundness of his opinions upon the matters of law involved in it. He was sufficiently able in the examination of witnesses, that is, examinations in chief. To any power of cross-examination he made no pretence; but all who are versed in the profession know how much more important the branch of interrogation is, in which he was tolerably skilled, than that which he did not affect. When a point arose unexpectedly, he was not perhaps so ready as Holroyd or Richardson, nor so full of resources as Littledale. But he was a useful helpmate to his leader. When the case came before the Court in Banc his argu-

ments were always distinguished by great extent of learning, were given with admirable precision, and his views of each point were luminously explained. He showed not the legal genius of Holroyd or the inexhaustible subtlety of Littledale, but he argued both learnedly, distinctly, and skillfully. His mind had one peculiarity. He could pursue a train of reasoning well and clearly up to a certain point; when pressed with an answer or gravelled with a difficulty, his power seemed spent, he could not carry the contest of argumentation further. Hence, in many special cases which he argued, when he began, having the last as well as the first word, men perceived the reply to be feebler than his opening argumentation. But they who grappled with him in private contention were far more sensible of this defect in his reasoning powers. It seemed as if he had fully prepared himself for one view, and regarded the case as confined within that horizon, and having nothing beyond it.

His opinions were admirable. No one could more entirely enjoy the confidence of consulting clients; and no one better deserved it. No one of his day was more resorted to, or more trusted by clients who had important cases to be advised upon. This great eminence as a chamber counsel was fortunate; for his practice had materially declined upon taking office, and a change of ministry removing him from his place before he should be promoted to the Bench, must have left him chiefly to rely on his practice as a chamber counsel. He had never indeed been a king's counsel, but he could hardly, after being solicitor general, have returned to his place and his valuable practice behind the bar.

On the bench he well answered all the high expectations which had reasonably been formed of him. He was of patience inexhaustible, of temper uniformly and perfectly sweet, of a clear perspicuity to follow and unravel the most complicated case of facts, of complete legal knowledge, both speculatively and practically, above all, of inflexible integrity, making the pursuit of truth, the distributing of justice, the genuine and sole object of his exertions, and sacrificing to the honest and diligent discharge of his duty all personal considerations whatever. It is furthermore to be added, that no advocate at the bar was ever more or less favoured by him

than another, an impartiality abundantly necessary to maintain the equal distribution of justice to the parties whom advocates represent, and an impartiality, let us with all respect towards judges observe, much less frequently to be found among their body than the more ordinary species of fairness, which in almost every instance happily distinguishes the ornaments of the bench.

We must not omit to record another praise of the late chief justice, to which we earnestly hope his able and excellent successor will carefully look and diligently emulate. Sir N. Tindal was concise in his judgments, and though abundantly diligent, yet never too elaborate in his investigation of a point or a cause. He did enough, and never overdid. Into both errors of excess and defect many able judges fall—and when we refer to the able, excellent, and very distinguished person who has become Chief Justice Tindal's successor, in terms of respectful and well-meant admonition, our drift is to remind Sir T. Wilde that even an advocate may err by excess of elaboration, because he may undo what he has done, may raise up indisposition in those whom he is addressing, and may weaken the very point which his over laboriousness is directed to strengthen. How much more should the judge guard himself against falling into the same error—not indeed because he may fail thereby to convince, for the purpose of his eloquence—the only legitimate purpose of judicial rhetoric—is not to convince, but only to declare the opinion, and to show the grounds it rests on; but because he must needlessly consume the public time and waste his own strength, and because he peradventure may raise doubts, shake his own judicial authority, and expose parties to the delay and vexation and cost of appeals, or even where no appeal lies, may bring the law into question, and raise up a crop of future litigation.

C. J. Tindal was, in his private capacity, one of the most virtuous and amiable of men. His integrity and his honour in all the relations of life was strict and without a stain. His talents were such as fitted him to shine in social intercourse, of which he was fond—indeed, a more delightful companion could hardly be found in the whole range of refined society. He was a truly pious as well as a strictly

moral man, and his religion being sincere, while his nature was mild and unassuming, he was entirely free from all intolerance, or any other base under growth of spiritual pride.

He had, in the autumn of 1809, married an amiable and accomplished person, Miss Symonds, the daughter of Captain Symonds, of the Royal Navy. She died a few years after, but left him two sons and a daughter. The grief which he suffered from her death was so severe, that he had serious thoughts of retiring from the profession.

In the sittings of the House of Lords after Trinity Term, he attended with the other judges on the important writ of error of the *Irish Society v. The Bishop of Raphoe*, and the appeal of *Shee v. Lord Muskerry*. Nor did he appear to be suffering from indisposition during the long and laborious arguments in these causes. But he was suddenly taken ill at the close of the latter argument, and, being carried to Folkestone, died, after a few days' illness, on Monday, 6th July, 1846.

When, on the following day, the opinions of the Judges were delivered by Mr. Baron Parke and Mr. Baron Alderson on the questions which had been submitted to them on the two causes which have been mentioned, the absence of him whom the lords had so often heard pronouncing, and with his wonted ability explaining and supporting the opinions of his brethren on similar occasions, gave rise to a tribute of grief rarely witnessed in that or any other judicial assembly. Lord Lyndhurst moving the judgment of the House in accordance with the judges' opinion, and Lord Brougham in supporting the motion, were both unable to proceed for the tears which literally stopt their utterance. The former said he had long known him as a dear friend and an official colleague—the latter was unable to say more than that, first having been his pupil, he had been his friend for forty years.¹

¹ The language of this, as of all our other papers, whether biographical or critical, is of course that of impartial truth, and not of indiscriminate praise. Nothing can be less instructive than what the French call an *éloge*; nor any thing more tiresome. But that is not all; nothing can tend more to defeat its own purpose. An undistinguishing panegyric never can exalt, though it may often lower its object.

NOTE TO ART. VIII. ON LEGAL EDUCATION.

WE may state generally that the cause of legal education by the Inns of Court is proceeding satisfactorily.

We have been favoured with some information on this subject which we are glad to lay before our readers.

Committees have been severally appointed by the Inns of Court to consider and report on this subject. At a meeting on the 11th of February last, the following suggestions were made by Mr. Bethell for their consideration:—

“1. That four Readerships be established in addition to the Readership on Jurisprudence and the Civil Law already established by the Middle Temple;—namely, a Reader on Constitutional and Criminal Law; a Reader on the Law of Real Property; a Reader on the Law of Personal Property and Commercial Law; and a Reader on Equity Jurisprudence as administered in the Court of Chancery. Of these it is suggested that the Reader on the Law of Real Property be founded and endowed by the four Societies conjointly; and the three other Chairs by Lincoln’s Inn, the Inner Temple, and Gray’s Inn.

“2. That the Lectures of the several Readers do commence in Michaelmas Term next.

“3. That a standing Committee or Council be established, to consist of twelve members: three to be nominated by each of the four Inns of Court; of whom five shall be a Quorum, and four go out of office annually. To this Committee shall be entrusted the duty of making all such regulations as shall be necessary for completing the details of the several measures which are hereby recommended.

“4. That the Lectures of the several Readers shall be open to the Students and Barristers of all the Societies, subject to the payment of such Terminal Fees to the several Readers as the standing Committee shall direct.

“5. That a Public Examination shall be established, to be held three times a year, for the examination of all such Students as shall be desirous of submitting thereto previously to being called to the Bar: and such Examination shall be conducted by the five Readers; and a standard of merit, as the condition of being en-

titled to the honours to be conferred and receiving the Exhibitions to be distributed, shall be fixed by the Committee ; to which, if no Student shall attain, no honour shall be awarded, nor shall any Exhibition be adjudged ; but the names of all Examinands who shall rise above the said standard of merit, shall be ranked in the order and according to the degrees of their respective attainments.

“ 6. That the Examinations be held three times in every year ; namely, Hilary Term, Trinity Term, and Michaelmas Term.

“ 7. That, as the Examinations are intended solely for such Students as are candidates for honours and rewards, no Student shall be admitted as an Examinand who shall not have diligently attended the Lectures of three of the Readers during one year ; and of which Readers, one shall be the Reader on the Law of Real Property.

“ 8. That from and after Michaelmas Term, 1847, no Student shall be eligible to be called to the Bar who shall not have attended during one whole year the Lectures of two of the Readers ; of which, the Reader on Real Property shall be one.

“ 9. That every Student who shall have attended during one whole year the Lectures of any two of the five Readers (the Reader on Real Property Law being one), shall have the same Privileges in point of admission to the Bar as are now allowed by any of the Societies in favour of Graduates of the English Universities.

“ 10. That Exhibitions be founded by the several Societies of Lincoln's Inn, the Inner Temple, and Gray's Inn, of the same number and amount as have been already established by the Middle Temple ; and as there is reason to hope that a ninth Exhibition may be added, it is trusted that the Societies will be in a condition to award three Exhibitions of One Hundred Guineas each at every one of the three Public Examinations, if a fitting standard of merit shall be attained to.

“ 11. That every means be adopted for giving honourable notoriety to the names of those Students who shall be deemed worthy of honours and rewards at each Public Examination ; and that every encouragement be held out to the Students to induce them to submit to the Examinations.

“ 12. That the Standing Council shall have power of granting dispensation to any Students who shall have been prevented by inevitable accident from complying in all respects with the regulations as to attendance, &c., which shall be established.”

These suggestions formed the basis of the discussion on the subject which subsequently ensued, and we understand that depu-

tations from each Committee consisting of three members of each Inn, (the Treasurer of each Society being of course one), met at the Inner Temple, and ultimately the following result was agreed to by the deputations, and was subsequently approved by the Committees :—

“ Minutes of the Result of the Conferences of the Deputations from the Committees of each of the Inns of Court on the subject of Legal Education as approved the 3d of June, 1846.

“ The deputations from the Committees appointed by the several Inns of Court to consider the subject of legal education, have communicated together, and are of opinion that the following propositions should be offered for adoption to their respective Societies.

“ That it is expedient to institute rewards, or honours, or both, by way of encouragement to students who may be willing to undergo examinations.

“ That for the purpose of preparing the students for such examinations, there should be established four lectureships in addition to that on Civil Law and General Jurisprudence already established by the Middle Temple.

“ That the subjects of the additional lectures should be : —

“ 1. Constitutional Law, Criminal and other Crown Law.

“ 2. The Law of Real Property and Conveyancing, devises and bequests.

“ 3. Those branches of the Common Law which are not included in the two last heads.

“ 4. Equitable Jurisprudence as administered in the Court of Chancery.

“ That the Lectureship for constitutional law, criminal and other crown law, should be maintained at the joint expense of the four Societies.

“ That the Lectureship for Civil Law and General Jurisprudence should be maintained as now at the sole expense of the Middle Temple.

“ And that the other three Lectureships should be maintained at the expense of the three other Societies respectively, — one for each as shall be hereafter arranged among themselves.

“ That no examination should be required of any student as a condition precedent of his call to the Bar.

“ That every student should be required, as a condition precedent of his call to the Bar, to produce a certificate of his having attended two of the courses of lectures, the selection to be determined by himself.

These suggestions have been already, we understand, adopted and acted on by the Middle Temple, who have ordered a Committee to be appointed on the part of that Society "to consider and approve of the best means of carrying the same into effect," and we trust that similar orders will be made by the other Inns of Court next term. It may also be proper to mention that Lords Lyndhurst, Brougham, and Campbell, showed their approbation of the scheme by dining with the deputations of the Inns of Court, at the Inner Temple, on the 6th of July, the day on which Lord Lyndhurst resigned the great seal, and Lord Campbell came into office. In the mean time Mr. Starkie has supported the cause by availing himself of his situation, as Reader of the Inner Temple, to deliver three valuable Lectures on the Science of the Law; and he has given notice that he will, in the ensuing Michaelmas Term, deliver Lectures on the Law of Libel.

PROCEEDINGS OF THE SOCIETY
FOR
PROMOTING THE AMENDMENT OF THE LAW.

[Permission has been obtained to insert the Proceedings and a selection of the Reports of the Society for Promoting the Amendment of the Law, but the Society is not otherwise responsible for the contents of this Review.]

THE THIRD ANNUAL REPORT OF THE COUNCIL.

YOUR Council have now for the third time to report to the Society their views of its state and prospects.

Our numbers have continued to increase. In our last Annual Report, though we were able to announce a considerable accession of members, we were obliged to add, that our recruits were principally from the ranks of the law : however much we were pleased at lawyers joining us who were willing to aid us, still we felt that our labours would be comparatively fruitless unless we received that support which the community at large alone can give. This year we are happy to state that we have also been joined by many members of both Houses of Parliament, and by many other gentlemen belonging to the mercantile and other classes of the community.

In the last year death has deprived us of two eminent members, the late Earl Spencer and Mr. Justice Story,—the one ever ready to promote any useful public object with his influence and purse, the other a man whose legal writings have acquired for him an European reputation. We notice with pleasure that one of our ordinary members, Mr. Burge, has been appointed to fill the office of Commissioner of the Leeds Court of Bankruptcy, an office in the due performance of which we take the greater interest, because it is one of

those offices which we owe to the progress of Law Amendment. In losing Earl Spencer we have to regret the loss of a Vice-president. The increasing importance of the Society, as evidenced by the number of Peers of Parliament who have joined it, has induced the Council to recommend that we should not merely fill up the vacancy thus occasioned, but increase the number of Vice-Presidents.

The Society has also enlarged the sphere of its exertions. They have called in the public to sanction and approve of their proceedings, and in that appeal they have been completely successful. At a public meeting held on the 6th of June instant, composed of many eminent and learned persons, as well members of this Society as persons not yet enrolled, resolutions in favour of its establishment and objects were unanimously passed.

It will be now our duty shortly to recapitulate the proceedings of the Society since our last Report. We have the satisfaction of stating that the machinery of the Society has worked well. The plan of referring suggestions to particular Committees competent to entertain them, which Committees report on them to the general body, where they are again discussed, has proved well adapted to afford opportunities both for careful and extensive consideration and inquiry. Inquiry indeed is the great object of the Society. It may be a humble one, but your Council submit that it is of unquestionable use that inquiry should precede and accompany all changes in the law, and that correct information as to them should be diffused.

The Committee on the Law of Property has proceeded with its useful and successful labours, and to this Committee, for its zeal and devotion to the cause, your Council feel that especial praise is due. The Bills for rendering the assignment of satisfied terms unnecessary and facilitating the conveyance of property, which were founded on their Reports, have passed into law. The first of these has been accepted both by the profession and the public as a great improvement. It has removed a source of great delay and expense, (the latter having been calculated as amounting to 200,000*l.* a year,) and has done much to simplify the title to land, while its security has been in no way diminished.

By the acts relating to deeds an effectual blow, as we believe, has been struck at awarding professional remuneration according to the length of the instrument, and something has also been done to shorten particular classes of deeds. Your Council have also observed with pleasure that the principle of these acts has been adopted and recognised by Her Majesty's Government in a Bill introduced in the present session for facilitating the granting of Leases in Ireland. These acts must also be taken as a legislative expression of opinion, that the profession should exert themselves in every possible way to cheapen and simplify the necessary dealings between man and man connected with real property.

This opinion has been subsequently and more emphatically expressed by the Report of a Select Committee of the House of Lords on the Burdens upon Land, a document which has justly received the greatest attention, and is entitled to the greatest weight, as expressing the unanimous opinion of all parties, in that branch of the legislature, of "the necessity of a thorough revision of the whole subject of conveyancing, and the disuse of the present prolix, expensive, and vexatious system."¹

As this opinion was similar to that expressed by this Society from its commencement, we cannot but consider the Lords' Report as a remarkable confirmation of our views, and (we trust we may add without presumption) some proof of the benefit which has already attended the diffusion of our Reports and proceedings.

Your Council is now watching, with great interest, the progress of the "Bill for further facilitating the Conveyance of Property," which stands for a third reading in the House of Lords without one dissenting voice having been yet expressed. This Bill is a further adoption of the recommendations of the Society. Your Council also invite attention to the other Reports which have proceeded in the present session from this Committee, more especially to those "On the Law of Mortgages," "On the Law of Usages and Trusts," and the two Reports "On the establishment of a General Registry of Deeds." We believe that in these Reports, and

¹ Report, p. 13.

in those previously submitted to the Society, are to be found suggestions of the utmost importance; and that by following them out carefully and gradually, the community will be able to obtain, 1. A more ready mode of investing money on the mortgage of lands, which will be equally advantageous both to the borrower and the lender; 2. The shortening and cheapening the deeds relating to the transfer of lands; and, 3. The simplification of the title to land, and more especially the reduction of the delay and expense now attending a retrospective investigation of title.

We believe that these measures will be a great advantage to all branches of the public, and more especially to the landed interest, and the trading and mercantile interest. We also consider that a great social benefit will be conferred on the community, if the number of small holders of land can be increased, and small capitalists be induced to invest their savings in land. Neither can we possibly believe that changes which will greatly facilitate all legal dealings with land, which will bring about a much larger and more rapid investment of capital in land, which will engage in legal transactions of this nature a much wider circle of the community, can in any way injure the legal profession. We cannot think that the practical exclusion of the great mass of the people from taking any interest in the transactions of conveyancing is beneficial to any class, but least of all is it so to that class whose peculiar business it is to assist and prepare them. Your Council therefore have the fullest confidence, that in recommending and furthering measures which improve and simplify the law, and facilitate to the utmost the alienation of property, they are the true friends of professional interests. Lawyers for the most part ourselves, we consider that the maintenance of the profession of the law in an honourable and prosperous state in all its branches, is beneficial not only to the lawyer but to his client. Your Council are desirous that the Society should act in harmony with the feelings and interests of the profession; and we believe that these are in this case, as in most others, identical with those of the community at large.

The Equity Committee is entitled to praise for much assiduous attention to the subjects referred to them. They have

presented a Report recommending the establishment of a Court of Trusts, with a view to creating a system of public Trusts, and thus superseding the necessity, if parties so please, of appointing private trustees. Your Council have reason to suppose that a Bill will be brought in with the view rather of having the principle of a Public Trustee considered, than of attempting to pass any measure of this sort in the present session. This Committee has devoted much time to the subject of the delays in the Masters' offices. The Committee have anxiously considered this important and difficult subject, and we look with hope and confidence to their ultimately suggesting a plan which may remedy this long-admitted grievance.

A useful Report from the Common Law Committee for rendering the law uniform in all cases of actions brought against persons acting in pursuance of public acts of Parliament, has been received, and a Bill founded on it has been introduced, and will probably become law in the present session.

The Criminal Law Committee has presented two very valuable Reports, one of which recommends for adoption the plan of Captain Maconochie, for the management of transported and other criminals; and the other reports in favour of submitting to the jurisdiction of the Petty Sessions unaggravated larcenies of small amount. Both these Reports were the fruit of great consideration and discussion; and we believe that much benefit in the diffusion of sound information has already resulted from them.

Your Council have the satisfaction of stating, that the income of the Society exceeds its present expenditure. We are desirous that, in conformity with the approved practice of almost all other Societies, we should endeavour to obtain as extensive a diffusion as possible of the Reports and proceedings of the Society. Having considered whether we should establish a separate publication for this purpose, or avail ourselves of any existing publication, we have come to the conclusion, that it would be both cheaper and more advantageous in the first instance to avail ourselves of an existing publication, if a suitable one could be found willing to forward the views of the Society. We have now much pleasure in announcing,

that we have been able to make an arrangement with the Publishers of the *LAW REVIEW* (which has, from its commencement, promoted objects similar to those of the Society), by means of which the Reports and proceedings of the Society will be regularly published, and a more permanent record of the proceedings of the Society may be obtained. According to this arrangement, the members of the Society will henceforth be presented with the *LAW REVIEW*, commencing with the current volume of that work. Our present resources have enabled us to do this. But the larger the funds are which are placed at our disposal, the more shall we be enabled, by the diffusion of sound information, to promote the objects of the Society.

In conclusion, your Council think that the present position of the Society is a subject of high congratulation; that its progress has been as rapid as the most sanguine could have reasonably expected; that its members may hope for a long and useful continuance of its labours; and that the Society has already effected much permanent good, and has laid a broad foundation for effecting much more. We wish particularly to impress on the Society, that this must mainly depend on the accession to our ranks of the young. They must carry out what we only are able to project; and to their industry and energy the Council look chiefly for the labour necessary for the completion of all great and useful undertakings.

21. Regent Street, June 17. 1846.

GENERAL MEETING, April 8. 1846. — JOHN HERBERT KOE, Esq.,
Q. C., in the Chair.

The Minutes of the last Meeting (the 25th March last) were read and confirmed. The following were elected as corresponding Members: Tristram Kennedy, Esq., Barrister, Principal of the Dublin Law Institute, Joseph Napier, Esq., Q. C., Dublin.

The following Members were ballotted for and elected: the Earl Grey, and Thomas Henry Farrer, Esq., Barrister.

The Report of the Committee on the Law of Property on the following reference: "To consider the Law relating to Mortgages," was ordered to be received.

The Report of the Committee on Criminal Law on the following reference was presented: "Whether unaggravated Larcenies of small amount may not be advantageously submitted to the jurisdiction of the Petty Sessions." It was agreed that the Report should be printed and further considered at the next Meeting.

The following reference was made to the Committee on Equity, "To consider the subject of Charitable Trusts."

Adjourned till Wednesday, the 22nd inst., at eight o'clock in the evening precisely.

Notice for Wednesday, the 22nd inst.

1. The Report of the Committee on Criminal Law as to unaggravated Larcenies will be further considered.

2. The Report of the Committee on the Law of Property on the following reference will be presented: "To consider of the propriety of establishing a general Register of Deeds and Instruments affecting Real Property."

GENERAL MEETING, April 22. 1846. — Mr. COMMISSIONER FOWBLANQUE, in the Chair.

The Minutes of the last Meeting (the 8th inst.) were read and confirmed. The following Members were ballotted for and elected, Thomas Baring, Esq., M.P., Raikes Currie, Esq., M.P., and William Bryden, Esq., Parliamentary Agent.

The Report of the Committee on Criminal Law on the following reference: "Whether unaggravated Larcenies of small amount may not be advantageously submitted to the jurisdiction of the Petty Sessions," was ordered to be received.

The Report of the Committee on the Law of Property on the following reference was presented: "To consider of the propriety of establishing a general Register of Deeds and Instruments affecting real Property."

It was agreed that the Report should be printed and further considered at the next Meeting.

Adjourned till Wednesday, the 6th day of May next, at eight o'clock in the evening precisely.

Notice for Wednesday, the 6th of May.

The Report of the Committee on the Law of Property as to the establishment of a general Register of Deeds and Instruments, will be considered.

GENERAL MEETING, May 6. 1846.—Mr. SERJEANT D'O'LY in the Chair.

The Minutes of the last Meeting (the 22d of April last) were read and confirmed. The following Members were ballotted for and elected: the Marquess of Clanricarde, K.P., John Parker, Esq., M.P., William Cotton, Esq., Bank Director, and Richard Austwick Westbrook, Esq., Solicitor.

The Report of the Committee on the Law of Property on the following reference: "To consider of the propriety of establishing a general Register of Deeds and Instruments affecting Real Property," was ordered to be received.

Adjourned till Wednesday, the 20th inst., at four o'clock precisely.

Notice for Wednesday, the 20th inst.

The Report of the Committee on the Law of Property on the following reference will be presented: "To consider whether it be possible and expedient to adapt the machinery of the Public Funds to the transfer of Real Property."

GENERAL MEETING, May 20. 1846. — SIR JOHN STODDART, LL.D., in the chair.

The Minutes of the last Meeting (the 6th inst.) were read and confirmed. The following Members were ballotted for and elected: the Lord Beaumont, the Lord Advocate, M.P., (the Right Hon. Duncan Macneil,) Captain Dawson, R.E., and James Moncreiff, Esq., Advocate.

It was agreed that a public meeting should be held at the rooms of the Society on Saturday the 6th of June next, at three o'clock, and that the President, Lord Brougham, should be invited to take the chair.

The Second Report of the Committee on the Law of Property on the following reference was presented: "To consider of the propriety of establishing a general Register of Deeds and Instruments affecting Real Property, and for this purpose to adapt the machinery similar to that of the public funds for the transfer of Real Property."

It was agreed that the Report should be printed and further considered at the next Meeting.

Adjourned till Wednesday, the 3d of June, at half-past four o'clock precisely.

Notice for Wednesday, the 3d of June.

The Second Report of the Committee on the Law of Property as to a general register of Deeds and Instruments will be further considered.

GENERAL MEETING, June 3. 1846.—Mr. COMMISSIONER FANE in the Chair.

The Minutes of the last Meeting (the 20th of May last) were read and confirmed. The Second Report of the Committee on the Law of Property on the following reference: "To consider of the propriety of establishing a general Register of Deeds and Instruments affecting real Property," was ordered to be received.

The following reference was made to the Committee on the Law of Property: "To consider whether in connection with a General Register the principle of Insurance of Titles might not be introduced."

Adjourned till Wednesday, the 17th inst.

Notices for Wednesday, the 17th inst.

1. The Annual Meeting at half-past four o'clock.
2. To receive the Report of the Council as to the state and progress of the Society.
3. The Accounts of the Committee of Management.
4. To elect Officers for the ensuing year.

ANNUAL MEETING, June 17. 1846.—The RIGHT HON. LORD BROUGHAM in the Chair.

The Report¹ of the Council as to the state and progress of the Society, was adopted, and ordered to be printed and circulated among the Members.

The accounts of the Committee of Management were presented and approved of. The following officers were ballotted for and elected for the ensuing year :

President.—Lord Brougham.

Vice Presidents.

The Duke of Richmond, K. G.	Lord Cottenham.
The Duke of Cleveland, K. G.	Lord Campbell.
The Earl of Devon.	Rt. Hon. Stephen Lushington,
The Earl of Radnor.	. D. C. L.
Lord Ashburton.	

¹ This is printed ante, pp. 446—451.

Committee of Management.

William Ewart, Esq., M.P.
Mr. Commissioner Fonblanque
Mr. Commissioner Fane.

George Spence, Esq., Q.C.
J. Pitt Taylor, Esq.

Treasurer.

James Stewart, Esq.

Hon. Secretary.

William Vizard, Esq.

The following Members were ballotted for and elected : Richard Cobden, Esq., M.P. ; J. A. Maynard, Esq., Barrister ; Nathaniel Hibbert, Esq., Barrister ; William Kingdom, Esq. ; Arthur Anderson, Esq., and Gurney Hoare, Esq., as representing Barnett, Hoares, and Co. Adjourned.

The next General Meeting will be held on Wednesday, the 1st of July next, at half-past four o'clock precisely.

Notice.

The Report of the Committee on the Law of Property on the following reference will be presented : "To consider whether in connection with a General Register the principle of Insurance of Titles might not be introduced."

GENERAL MEETING, July 1. 1846. — MR. COMMISSIONER FONBLANQUE in the Chair.

The Minutes of the last Meeting (the 3d of June last) were read and confirmed. The following Members were ballotted for and elected : John Pemberton Heywood, Esq. ; Charles Sturgeon, Esq., Barrister ; the Rev. Edward Muscutt ; George Warde Norman, Esq. ; Mr. Commissioner Phillips, and Henry Currie, Esq., as representing Messrs. Curries and Co.

Mr. James Stewart gave notice that he would move on the 15th of July for "a Special Committee to consider the best means of extending the range of the Society's operations."

The Report of the Committee on the Law of Property on the following reference was presented : "To consider whether in connection with a General Register the principle of Insurance of Titles might not be introduced." It was agreed that the Report should be further considered at the next meeting.

Notices for Wednesday, the 15th inst.

Motion for "a Special Committee" as above.

The Report of the Committee on the Law of Property as to the Insurance of Titles will be further considered.

GENERAL MEETING, July 15. 1846. — Mr. COMMISSIONER FONBLANQUE in the Chair.

The Minutes of the last Meeting (the 1st inst.) were read and confirmed. The following Members were ballotted for and elected: William Marratt, Esq., Solicitor; Thomas Metcalfe, Esq., Solicitor; John Lewis Prevost, Esq.; John Abel Smith, Esq., M.P.; Samuel Jones Loyd, Esq., as representing Messrs. Jones, Loyd, and Co.; Bazett David Colvin, Esq., and the Rev Charlton Lane, M.A.

It was resolved, that a Committee be appointed to consider the best means of extending the range of the Society's operations, to consist of the following members: the Earl of Devon; Lord Nugent; Mr. Commissioner Fonblanque; Mr. Commissioner Fane; Mr. Ewart, M.P.; the Hon. E. P. Bouverie, M.P.; Mr. Pitt Taylor; Mr. Symonds; Mr. Neale; Mr. Edward Cooke; Mr. Webster; Mr. Thomas Parker; Mr. Wilson; Mr. Ashton Yates; Mr. Ingram Travers; Mr. Vizard; and Mr. James Stewart.

The Report of the Committee on the Law of Property, on the following reference: "To consider whether in connection with a General Register the principle of Insurance of Titles might not be introduced," was referred back to the Committee to consider whether any and what alterations in the Law were necessary, in order to carry the proposed plan into effect.

Adjourned till Wednesday, the 29th inst. at half-past four o'clock precisely.

RESOLUTIONS PASSED AT THE PUBLIC MEETING

Held on the 6th June, 1846.

[We have only room, in the present number, for the Resolutions which were agreed to at this meeting. We think we are not overstating its importance, when we describe it as forming an æra in the history of the law. It is the first public meeting that ever took place for the avowed object of improving the law. The noblemen and gentlemen who moved the resolutions are almost all known to the public either as political leaders of their respective parties, or of eminence in the legal profession, and the whole assembly established the fact of the union of many eminent persons to obtain the objects of the Society. This meeting also clearly

demonstrates that the reform of the law may be promoted as a question untainted by party considerations; and the part taken in it by the legal profession wipes off the stain which was supposed to rest on it of an indifference approaching to hostility to this great cause.]

AT a PUBLIC MEETING held at the Rooms of this Society on the 6th of June, 1846, LORD BROUGHAM in the Chair,

1. It was proposed by Lord Monteagle, seconded by Mr. Serjeant D'Oyly, and carried unanimously, "That the well-considered and practical amendment of the law is of the utmost importance to all classes of the community, and that this object may be advantageously promoted by a Society composed of members of all classes of the legal profession, and other persons not belonging to that profession desirous of co-operating with them."

2. It was proposed by the Marquis of Clanricarde, K.P., seconded by Lord Beaumont, and carried unanimously, "That the transfer of real property is greatly impeded by the existing system of conveyancing, and that the market value of land is thus kept down below its just price."

3. It was proposed by Mr. Bethell, Q.C., seconded by Mr. Spence, Q.C., and carried unanimously, "That the proceedings of the Court of Chancery require great and extensive amendment."

4. It was proposed by Mr. Commissioner Fane, seconded by Mr. James Stewart, and carried unanimously, "That the law of debtor and creditor occasions great dissatisfaction throughout the trading and other branches of the community, inasmuch that it is neither sufficiently considerate towards the honest debtor, nor sufficiently stringent towards the dishonest debtor."

5. It was proposed by the Duke of Richmond, K.G., seconded by the Marquis of Normanby, and carried unanimously, "That great as are the amendments which have been recently effected in the Criminal Law, much yet remains to be done both with respect to punishment and procedure, more especially as regards the system of secondary punishments and the treatment of juvenile offenders, and the due preparation of a Criminal Code or Digest."

6. It was proposed by the Earl of Radnor, seconded by Mr. Ewart, M.P., and carried unanimously, "That the existing system of framing Public Acts of Parliament is deficient in clearness and uniformity of language, and that it is desirable that some measure should be adopted to insure these manifest advantages to the Houses of Parliament, the Courts of Justice, and the public at large."

7. It was proposed by Mr. Hume, M.P., seconded by Mr. Duckworth, and carried unanimously, "That in an especial manner some improvement in the course of legislative procedure is required for transacting the private and local business of the country in Parliament in a manner satisfactory to all parties and consistent with the undoubted privileges of Parliament.

8. It was proposed by Mr. Starkie, Q.C., seconded by the Duke of Richmond, K.G., and carried unanimously, "That the thanks of this Meeting are due to Lord Brougham, for his able and impartial conduct in the Chair."

SELECTION OF ADJUDGED POINTS

REPORTED SINCE 1ST MAY, 1846.

POINTS IN COMMON LAW, p. 459.

POINTS IN EQUITY, p. 475.

POINTS IN THE LAW OF PROPERTY, 487.

COURTS.			REPORTERS.
L. C. of Ireland	-	-	Drury. Vol. 1. part 1. Jones and Latouche. Vol. 1. part 4. Drury and Warren. Vol. 4. part 3.
Queen's Bench	-	-	Q. B. Rep. Vol. 6. part 2.
Exchequer	-	-	Mees. and W. Vol. 14. part 4.
Practice Courts	-	-	Dowl. and Lowndes. Vol. 3. part 2.
Common Pleas	-	-	Mann. and Granger. Vol. 7. part 4. Common Bench. Vol. 1. part 3.
V. C. of England	-	-	Sim. Vol. 13. part 4.
Master of the Rolls	-	-	Beav. Vol. 7. part 3.
V. C. Wigram	-	-	Hare. Vol. 4. part 4.

I. POINTS IN COMMON LAW.

1. Patent. Previous Publication. 2. Patent. Hint of Design from Servant.
3. Mercantile Contract. Cargo, Freight. 4. Reward for Apprehension of Criminal. 5. Contract. Dependent Agreements. 6. False Representation. Scierter. 7. Sheriff. 8. Lien of Solicitor. Duress of Goods. 9. Compromise of Prosecution when good Consideration. 10. Action for Money extorted. 11. Public Company. Liability of Shareholders. 12. Corporation, what Acts it may do without Seal. 13—15. Pleading, Practice and Costs.

1. STEAD V. WILLIAMS. 7 Mann. & Granger, 818.

Patent — Originality — Previous Publication unknown to Patentee.

A patentee must be the original inventor of his design: but if the subject has previously formed part of the public stock of information, the claim of originality is defeated. The inventor's ignorance

of a previous discovery or publication of the same invention will not avail him in support of his patent, nor deprive the community of their right to the free use of such information as they had acquired before the plaintiff took out his patent. "If a machine (says Lord Lyndhurst) is published in a book, distinctly and clearly described, corresponding with the description in the specification of the patent, though it has never been worked, is not that an answer to the patent? It is continually the practice on trials for patents to read out of printed books, without reference to anything that has been done."¹ In the present case Mr. Stead brought an action for the infringement of a patent for an invention for "making or paving public streets and highways, &c. with timber or wooden blocks." The defendants pleaded that the plaintiff was not the first and true inventor; and produced in evidence a scientific work containing a letter, which gave a description of a mode of paving with wooden blocks, on a plan not substantially differing from the plaintiff's specification. In summing up the evidence with respect to this plea, the learned judge told the jury, that if they thought the patentee had *borrowed* his invention directly from the publication which had been proved, he could not be deemed the first inventor; also, that if the matter had been so far communicated to the public as to have become a part of the public stock of information, *and he had thus obtained his knowledge* indirectly from the publication, he could not be considered as the first inventor. The jury found a verdict for the plaintiff; but, on an application by the defendants for a new trial, it was contended, that the learned judge, in his summing up, had not presented the whole case to the jury: and it was argued, that if the invention had been publicly made known in England, although it had never come to the knowledge of the patentee, still he could not be considered the inventor. It was also urged, that if the invention had already been communicated to the public, it would be unreasonable that they should lose the benefit of it, or be restricted from the use of it, by a patent taken out by one whose claim could only be supported on the ground of his ignorance of that which had already been communicated to the rest of the world. Tindal C. J. "On a full consideration of the subject, we have come to the conclusion, that the view taken by the defendants' counsel is substantially correct: for we think, if the invention has already been made public in England by a description contained in a work, whether written or printed, which has been publicly circulated, the

¹ Per Lord Lyndhurst, 1 Webst. Pat. Ca. 718.

patentee is not the first and true inventor, whether he has himself borrowed his invention from such publication or not; because, we think, the public cannot be precluded from the right of using such information as they were possessed of at the time of the patent granted. The application of this principle must depend upon the particular circumstances which are brought to bear on each particular case. The existence of a single copy of a work, though printed, brought from a depository where it has long been kept in a state of obscurity, would afford a very different inference from the production of an encyclopædia, or other work in general circulation. The question will be, whether, upon the whole evidence, there had been such a publication as to make the description a part of the public stock of information. We think, therefore, that, as this question has not been submitted to the jury, there ought to be a new trial.”¹

2. ALLEN v. RAWSON. 1 Common Bench Rep. 551.

Patent — Originality — Hint of Design from Servant.

One point in this case (which was an action for the infringement of a patent), raised the question how far a discovery made by a person employed by the patentee in working out his experiments, and communicated to him by the discoverer, can be incorporated into the invention, so as to give the patentee the rights of an original inventor over the whole subject of the patent. The patent, which the plaintiff had purchased of Williams, the patentee, related to improvements in the manufacture of cloth by felting; and the originality of the invention being impeached, on account of Williams’s adoption of some suggestions made by one Shaw, a person in his employ, the learned Judge (Mr. Justice Erle) thus expounded the law to the jury at the trial: — “I take the law to be, that if a person has discovered an improved principle, and employs engineers, or agents, or other persons, to assist him in carrying out that principle, and they, in the course of the experiments arising from that employment, make valuable discoveries accessory to the main principle, and tending to carry that

¹ In *Woodin v. Field*, Coram V. C. E., June 1846, a special injunction had been obtained by the plaintiff to restrain the defendant, a farrier and veterinary surgeon, from making or vending a species of indented horse-shoe, which was described by the plaintiff’s specification as designed to obviate the slipperiness of the wooden pavement. The defendant afterwards succeeded in dissolving the injunction upon an affidavit, stating, that an exactly similar contrivance was described in a work published 200 years ago on farriery.

out in a better manner, such improvements are the property of the inventor of the original improved principle, and may be embodied in his patent: and if so embodied, the patent is not avoided by evidence that the agent or servant made the suggestions of that subordinate improvement of the primary and improved principle." The jury found a verdict for the plaintiff. A similar doctrine, regarding a patent for easy reclining chairs, was propounded by Mr. Baron Alderson, in *Minter v. Wells*¹, in these terms:—"If Sutton suggested the principle to Minter, then he would be the inventor: if, on the other hand, Minter suggested the principle to Sutton, and Sutton was *assisting* him, then Minter would be the first and true inventor, and Sutton would be a machine, so to speak, which Minter uses for the purpose of enabling him to carry his original conception into effect." And in the argument of the case before us, Mr. Justice Maule made a corresponding remark, that it would be very dangerous to employ any workman in matters of this sort, if the inventor were precluded from adopting any slight and subordinate improvement suggested by him. The final judgment of the Court accorded with these opinions. *Tindal C. J.* "It would be difficult to define how far the suggestions of a workman employed in the construction of a machine are to be considered as distinct inventions by him, so as to avoid a patent incorporating them, taken out by his employer. Each case must depend upon its own merits. But when we see that the principle and object of the invention are complete without it, I think it is too much that the suggestion of a workman employed in the course of the experiments, of something calculated more easily to carry into effect the conceptions of the inventor, should render the whole patent void." *Maule J.* "I think that if the jury in this case had come to a different conclusion, they would have done wrong. As well might the man who first suggested the sliding tubes assert himself to have been the inventor of an essential part of the telescope."

3. LEWIS V. MARSHALL. 7 Mann. & Gr. 729.

Mercantile Contract — Cargo — Freight.

The principal question in this case related to the meaning of the words "cargo" and "freight." A ship-broker engaged with the owners of the *Stratheden* to have a *full cargo* for the ship, the rates of freight for which would average forty shillings per ton,

¹ 1 Webster's P. C. 132.

and at least nine cabin passengers, whose passage-money should average 75*l*. The cabin passengers were obtained, but the average rate of the freight for the *goods* put on board by the broker amounted to only thirty-two shillings per ton. He shipped, however, several steerage passengers for the voyage, and the amount of their net passage-money, when added to the freight of the cargo properly so called, brought up the average freight of the ship to more than forty shillings per ton. The broker contended for the right to treat the steerage passengers as cargo, and their passage-money as part of the stipulated freight. The action was brought against the broker for a breach of his guarantee, in not procuring eight at forty shillings per ton for a full cargo of *goods*: and at the trial the learned Chief Justice of the C. P. told the jury that in his opinion the broker had undertaken to procure a full cargo of goods properly so called, which should average a freight of forty shillings per ton. The jury, nevertheless, found a verdict for the defendant. A motion for a new trial was then made. Tindal, J. — "The contract itself, as it appears to us, speaks with much plainness and precision. The words *cargo* and *freight* do, *primâ facie*, and in their natural and ordinary meaning, refer to *goods* only; and where in the same document occur the words "cabin passengers," and "passage-money," and a contract is made between the same parties as to such latter mentioned subject matter, the inference is almost irresistible, that the former words were not intended, within the meaning of the contracting parties, to comprise passengers or passage-money of any description; the parties shewing themselves capable of making a contract as to passengers by their proper and specific name." Rule absolute for entering a verdict for the plaintiff for such sum as shall be ascertained between the parties under the agreement.

4. LOCKHART v. BARNARD. 14 Mees. & W. 353.

Reward for Apprehension of Criminal — Pleading.

In 1843, a parcel containing bank notes and bills of exchange, was directed to Sir Charles Price and Co., bankers, in the city of London, and was forwarded from Bedford to London by coach. The parcel having been lost, the bankers issued a handbill describing the loss, and concluding with these words: "Whoever will give such information as will lead to the immediate recovery of the above parcel, with its contents safe, if lost, or the early apprehension of the guilty parties, if stolen, shall receive the above

reward (100*l.*). Measures are taken for discovery if the above notes or bills are attempted to be fraudulently circulated." In May, 1844, one Richards, who was afterwards convicted of the robbery, came to the plaintiff's shop and tendered a 10*l.* bank note in payment for goods. Richards was desired to write his name on the note; and having done so, he received the change. After making inquiries respecting the address given by Richards on the note, the plaintiff suspected it to be a forgery, and made known his suspicions to one Cheshire, who thereupon stated that he and others had also given change for bank notes to Richards. The robbery having come to the knowledge of the plaintiff and Cheshire, they mentioned the matter to several neighbours, and in the course of conversation, the plaintiff proposed to go for a constable; but a groom named Robinson said *he* had better go, and he accordingly fetched a constable, who, by means of the information then communicated to him, discovered and apprehended Richards. The plaintiff, however, was the only person who could identify Richards as having any of the stolen notes in his possession; and upon the plaintiff's evidence Richards was convicted, and sentenced to transportation. Under these circumstances two points were taken by the defendant at the trial: 1st, that the plaintiff's communication to Cheshire gave the plaintiff no title to the reward, the information not having been given either to the party offering the reward, or to his agent, or to any person legally authorised to apprehend the prisoner; and secondly, that the information was given to the constable by the plaintiff and Cheshire jointly, so that Cheshire ought to have been a co-plaintiff. These issues were left to the jury under the direction of the learned Judge. The jury found for the plaintiff on the first issue; and upon the second issue they found that the information which was given by Robinson to the constable, and which led to the apprehension of the criminal, was the joint information of the plaintiff and Cheshire. On the second issue, therefore, the verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter a verdict for himself on that issue also. The motion was accordingly made. Pollock, C. B. "Here the plaintiff communicates certain information to Cheshire, who, in return, makes a communication to the plaintiff; and then, deeming their joint knowledge sufficiently important to call for further inquiry, they jointly communicate it to Robinson and others: and he (Robinson), as the agent of both, communicates it to a constable. I therefore think that the finding of the jury, that the information which led to the detection of the felon, was given not by Lockhart alone,

but by him jointly with Cheshire, and the entry of the verdict upon that finding, were perfectly right." Rule refused.

5. ATKINSON v. SMITH. 14 Mees. & W. 695.

Contract — Dependent Agreements.

In November, 1844, the defendant, by his agent, requested the plaintiff to sell to the defendant some Cheviot fleeces; and at the same time agreed to sell to the plaintiffs some coarse woollens called *noils*. The following note was exchanged between the parties: "Bought of Atkinson and Co., about 30 packs of Cheviot fleeces, ewes and hogs, and agreed to take the undermentioned noils: also agreed to draw for 250*l.* on account, at three months." Some of the fleeces were supplied by the plaintiffs, and the defendant delivered part of the noils, but on their rising in price, he refused to deliver the remainder. In this state of things the plaintiffs brought an action of *assumpsit* for the breach of contract; and at the trial the defendant contended that the contract was one and indivisible, so that the delivery or tender of all the fleeces was a condition precedent, which the plaintiffs ought to have averred and proved. The learned Judge, being of this opinion, directed a nonsuit, which was afterwards confirmed by the full Court. Alderson, B. "Surely it is all one contract. The one sale is the consideration for the other. The plaintiffs should have declared on a contract that, in consideration that they would sell wool, the defendant would deliver noils by way of part payment, and give a cheque for 250*l.* for the residue." Parke, B. "The plaintiffs say, we will sell you wool at such a price, provided you will sell us noils at such a price. They are not independent contracts, but the whole is one entire contract; and if the plaintiffs do not supply the fleeces, the defendant is not bound to supply the noils. Even if the word *take* means to take by way of purchase, the result is the same: one stipulation being dependent on the other."

6. ORMROD v. HEATH. 14 Mees. & W. 651.

False Representation — Scienter.

A party who upon the sale of goods, makes a simple representation, stands in a very different position from one who gives a warranty. Whatever a party warrants, he is bound to make good to the letter of the warranty, whether the quality warranted be material or not; it is only necessary for the buyer to shew that the article is not according to the warranty: whereas if an article

be sold by description merely, and the buyer afterwards discovers a latent defect, he must go further, allege the *scienter*, and shew that the description was false within the knowledge of the seller. Hence if the seller has good reason to believe his representation to be true, or no cause to suspect it to be false, he incurs no liability by his representation. The *scienter* is always the gist of an action for a false representation; so that if a party *bonâ fide* believes, though he does not *know*, the truth of the representation which he makes, an action does not lie. In order to render a false representation actionable, it must be fraudulently made. Therefore, in a sale of goods by sample, the seller, in the absence of warranty or fraud, is not liable for an unknown defect in the goods sold. The foregoing principles receive full confirmation from the case now under review. The plaintiff was a cotton spinner who had bought, through a broker, several bales of cotton from the defendants, who were merchants at Liverpool. The usual method of buying cotton is through brokers, who exhibit samples by which they sell: an inspection of the bulk is never practised. The samples are drawn from a slit in the bale; and when any part of the bale proves to be of a quality inferior to that found at the slit, it is said to be falsely packed, and is deemed unmerchantable. The buyer's broker, in order to test the cotton, usually draws samples by his own people from the bale, and in the present case he thus discovered, by the re-drawn samples, that several of the bales purchased by the plaintiff were falsely packed. The defendants were the consignees, and it was proved that the cotton came direct to their warehouse from the ship's side. Upon this evidence the learned Judge told the jury, that unless they could see grounds for inferring that the defendants or their brokers were acquainted with the fraud in the packing, or had acted in the transaction with bad faith, or with some fraudulent purpose, the defendants were entitled to a verdict. The jury accordingly gave a verdict for the defendants. A bill of exceptions to the learned Judge's direction having been tendered by the plaintiff, a writ of error was brought, but, after full argument, in which all the authorities were reviewed, the Court of Exchequer Chamber decided that the learned Judge's direction to the jury was correct. Tindal, C. J. "The rule which is to be derived from all the cases appears to us to be, that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller, unless he can shew that the representation was bottomed in fraud. If indeed the representation was false to the knowledge of the

party making it, this would in general be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of caveat emptor applies, and the representation itself does not furnish any ground of action. And although the cases¹ may, in appearance, raise some difference as to the effect of a false assertion or representation of *title* in the seller, it will be found on examination, that in each of those cases there was either an assertion of title embodied in the contract, or a representation of title which was false to the knowledge of the seller." . . . "The exception must be disallowed, and the judgment of the Court of Exchequer affirmed."

7. CLIFTON V. HOOPER AND ANOTHER. 6 Q. B. 468.

Sheriff — Omission to Arrest — Action for Breach of Duty where no Pecuniary Damage.

The plaintiff in this action had obtained a judgment in the Court of Queen's Bench against one Regan, and sued out a *ca. sa.* directed to the defendants, the sheriffs of Middlesex, to levy the amount. The defendants delayed the execution of the writ, and in the mean time Regan obtained protection from arrest under the 5 and 6 Vict. c. 116. s. 1., and the defendants made a return of non est inventus. Regan's petition was afterwards dismissed, and he was then arrested on an alias *ca. sa.*, and subsequently, on his petitioning the Insolvent Debtors' Court, he was discharged without the plaintiff having received any satisfaction for his debt. At the trial the jury found that the sheriff was in default, but that the plaintiff had sustained no damage. A motion was afterwards made for a rule to enter a verdict for plaintiff for the full amount of the judgment debt, or for nominal damages. Lord Denman, C. J. "As the finding of the jury was that the sheriff did not do his duty, the rule must be absolute for nominal damages. When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount. There is no authority to the contrary. Williams v. Mostyn (4 M. and W. 145.) is expressly to the point, if what is said there be applied to the case where the debtor might be arrested, but is not. The Court of Exchequer said there, that if

¹ Budd v. Fairmaner, 8 Bing. 52. Parkinson v. Lee, 2 East, 313. Taylor v. Ashton, 11 Mees. and W. 413.

a debtor is arrested on final process, and escapes, there is a cause of action, though no pecuniary damage be shewn: the creditor has a right to have the body in gaol; and the escape of the debtor, for ever so short a time, is necessarily a damage to him, and the action for an escape lies. But as to the amount of damages, the plaintiff in such a case cannot say that he has lost the whole debt. He has lost the body of the debtor, but it must still be a question what that loss amounts to; and that will be only so much as the jury think the detention would have been worth. Then, if no real loss has been sustained, the case becomes like *Marzetti v. Williams* (1. B and Ad. 415.); the action lies for some damages, though not for any particular amount."

8. WAKEFIELD V. NEWBORN AND OTHERS. 6. Q. B. 276.

Lien of Solicitor. — Mortgage — Action for Money extorted — Duress of Goods.

The principal point decided in this action was as to the lien of solicitors. The plaintiff was a mortgagor of certain property, and the defendants were the mortgagee's solicitors, to whom the mortgagee had handed over the title deeds. The property was afterwards reconveyed to plaintiff on payment of the principal and interest, but the defendants refused to deliver up to plaintiff the title deeds, unless he would also pay their bill of costs. The plaintiff paid the costs, but under protest, and brought an action of assumpsit to recover the amount. A verdict was taken for the whole amount, but defendants afterwards moved for a nonsuit. Part of the costs were in respect of the conveyance, but the rest arose exclusively from the relation of the mortgagee to the defendants as clients and solicitors. Lord Denman, C. J. "We are of opinion that the defendants were clearly wrong in withholding the deeds till the latter sum was paid: for it appears from *Hollis v. Claridge* (4 Taunt. 807.), and is the known practice, that a mortgagee cannot, by handing over deeds to his attorney, create a new lien against the mortgagor in respect of a debt of his own.

It was also held, that "money extorted by duress of the plaintiff's goods, and paid by the plaintiff, under protest, may be recovered in an action for money had and received."

It was objected in this case that there was a want of privity between the plaintiff and defendants. Lord Denman, C. J. "The privity in the original transaction was indeed between the defendants and their client: but, when the defendants compelled the plaintiff to part with money in order to regain possession of his rights, the law created a privity between them, and implied a

promise to repay what the defendants should appear to have improperly obtained."

9. KEIR v. LEEMAN AND ANOTHER 6 Q. B. 308.

Compromise of Prosecution, when good Consideration for a Contract.

The plaintiff in this action recovered a judgment in the court of Queen's Bench against G.E. for a debt, and sued out a *fi. fa.* A., the sheriff's officer, entered the dwelling-house of G. E. and made a seizure, when he was forcibly ejected by G. E. and others, who shut the outer door against him and detained the goods so seized until A. succeeded in re-entering and retaking them. Plaintiff preferred an indictment against G. E. and the others for riotously assembling to disturb the peace, and for assaulting A. and his followers. The indictment was found, and stood for trial. When the indictment was about to be tried, in consideration that the prosecutor (the now plaintiff), at the request of defendants, would not proceed further in the indictment, and the sheriff would, with the consent of the plaintiff and at the request of the defendants, withdraw from the possession of the goods under the execution against G. E., the defendants undertook and promised to pay to plaintiff, on or before a day then named, the balance of the principal money and costs then remaining unsatisfied in the original cause, and the balance of costs incurred in and about the execution of the *fi. fa.* Plaintiff accordingly obtained the leave of the Court to abandon the indictment, and the parties were acquitted, and the execution was also withdrawn. The defendants failing to pay the balance of principal money and costs according to their promise, the plaintiff brought this action of assumpsit to recover the amount. The defendants in one of their pleas set out the indictment, and the substance of the plea was, that the parties indicted being charged with riot and assault, assault on a sheriff's officer in the execution of his duty, assaults upon persons then acting in aid of a peace officer in the due execution of his duty, with intent to resist the apprehension of the then defendants for an offence for which they were liable to be apprehended, &c., the consideration for the supposed promise was and is illegal, and such supposed promise was and is wholly null and void. Lord Denman, C. J. "We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public

nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it. In the present instance, the offence is not confined to personal injury, but is accompanied with riot and obstruction of a public officer in the execution of his duty. These are matters of public concern, and therefore not legally the subject of a compromise. The approbation of the judge (whether necessary or not) may properly be asked on all occasions where an indictment is compromised on the trial; plainly it cannot make that legal which the law condemns. But, according to this record, the obtaining it was not made a condition of the promise, nor was it in fact attained till after the agreement made. So much was said in argument for the purpose of raising a doubt whether the plaintiff was prosecutor of the indictment, and had bound himself to any thing inconsistent with his public duty in withdrawing the prosecution and forbearing to adduce evidence in support of the indictment, that we ought not to pass it over entirely. The language of the declaration and of the plea, however, requires only to be read to shew that there is no real doubt on the point. We think the agreement invalid, as founded on an illegal consideration, and that the defendants are entitled to judgment."

10. GOODALL v. LOWNDES, 6 Q. B. 464.

Action for Money extorted — Principal and Agent — Compromising Indictment.

An order was made at Quarter Sessions against the plaintiff for payment of the maintenance of his illegitimate child. The payment being refused by plaintiff, the guardians of the union preferred an indictment against him at the Quarter Sessions for a misdemeanour in disobeying the order, and the grand jury found a true bill. The plaintiff removed the indictment into the Court of Q. B. by *certiorari*; but, before the time for trial, he, by his attorney, compromised the matter with the guardians, and paid to the clerk of the board a sum for maintenance, together with the costs. It afterwards appeared that the order made at Quarter Sessions was invalid through informality, and thereupon the plaintiff brought the present action of assumpsit against defendant, the clerk to the guardians, to recover the whole amount paid. The defendant had merely acted as clerk to the guardians, and there was no duress, the plaintiff having voluntarily sent his attorney to make the compromise. Lord Denman, C. J. "In this case the amount levied certainly seems to have been excessive; but we think that the plaintiff could not recover it back. No

proceeding of the defendant's appears, beyond preferring the indictment. The facts do not prove extortion by duress, nor warrant an action against him for money had and received. And if the transaction was wrong, the parties are in *pari delicto*, and one of them cannot, after voluntarily paying his money, repent and then sue the other."

11. LAKE V. DUKE OF ARGYLL 6 Q. B. 477.

Public Company — Liability of Shareholders.

Certain persons met together with the view of forming an emigration society, and at their request the Duke of Argyll consented to be their president. He attended one of the subsequent meetings, when he acted as president, and signed the resolutions agreed on at such meeting, one of which directed the proceedings to be printed. Papers in which he was announced to the public as the president of the society were regularly sent to him, but he afterwards withdrew from the society, and the company was never completely formed. The plaintiff, who printed the prospectuses, pamphlets, &c., brought an action of assumpsit against the duke for goods sold and delivered, work and labour, &c., and obtained a verdict. A motion was afterwards made for a rule for a nonsuit or a new trial. It was, however, refused by the Court. Lord Denman, C. J. "It did not appear that the company had ever been formed according to its intended constitution. But it may be proper to distinguish between acts done by the company in execution of their project, and acts done by those who hold meetings preliminary to the erection of that company. In the former character, the tradesman may be bound to shew that it was so created according to the announced terms: he might have no right to separate the statement, in a prospectus or any similar publication, that the defendant meant to be a member, from the accompanying statement that no company was to exist till a certain capital was raised, or a certain amount paid, or any other condition precedent complied with. But, when persons meet to prepare the measures necessary for calling the society into existence, attendance on such meeting and concurrence in such measures may be strong evidence that any individual there present, and taking part in the proceedings, held himself out as a paymaster to all who executed their orders; and, though not liable as a member or a shareholder, yet his declared intention to become the president or a member in whatever event, or to take a share under any conditions, may be material evidence to shew that he authorized con-

tracts with those whose services were required by what may be called the constituent body. In this case the work done by the plaintiff was obviously necessary for their purposes. Part of it was ordered in the defendant's presence, by a resolution read by the defendant from the chair. The proof was not conclusive: the plaintiff might have been informed, or he might have believed from circumstances, that others were to pay him, and that the duke was merely giving his name and presence to forward the general objects, without taking any part in employing him. The circumstances which might fairly have led to this inference were fully commented upon in summing up. But we cannot say that the jury have done wrong in thinking that they did not absolutely outweigh the defendant's conduct in the particulars above mentioned."

REGINA V. MAYOR, &c. OF STAMFORD. 6 Q. B. 433.

Corporation — What Acts it may do without Seal — Quashing Mandamus.

Prior and up to the passing of the Statue 5 & 6 W. IV. c. 76. the offices of town clerk, clerk of the peace, and clerk to the justices of the borough of Stamford, were held by J. Torkington: after the passing of the statute he was re-appointed town clerk, but s. 102 of the Act rendered it illegal for him to be re-appointed clerk to the justices. A resolution was entered on the minutes of the town council, that a salary of 100*l.* a year should be allowed; his salary as town clerk and clerk of the peace being before only 4*l.* a-year; and this resolution was agreed to by the town council, in consequence of the loss which Torkington had sustained in being deprived of his office of clerk to the justices, and other profits under the corporation, which he had enjoyed before the passing of the statute; but no agreement under seal was entered into. Torkington received his salary for five years, and then claimed compensation for the loss of salary, fees, and emoluments of the office of clerk to the justices; but the claim was refused. After cause shewn, a writ of mandamus was issued, directed to the Mayor, Aldermen, and Burgesses, commanding them to assess the compensation, and secure the amount by a bond. The return stated that the increase of salary was agreed upon and expressly accepted by Torkington as an absolute pecuniary compensation for the loss of his office of clerk to the justices, and for all other losses which he had incurred or might incur by the operation of the statute. The return was traversed, and issue joined thereon, and on the trial the jury were of opinion that there was a parol agreement. It was held by the

Court of Queen's Bench, that the agreement could not bind without being sealed. An application was made to quash the mandamus, on the ground that the prosecutor had deceived the Court when the mandamus was obtained. Lord Denman, C. J. "I think we have no right to quash the writ on that ground. No case is cited in which the Court has quashed a mandamus on grounds which might have been shewn against making the rule for a mandamus absolute."

13. NEEDHAM *v.* FRASER. 3 Dowl. & Lowndes, 190.

Pleading — Admission on the Face of the Record.

This was an action on the case against the defendant for not attending as a witness at nisi prius, in pursuance of a subpoena. The declaration stated, that the plaintiff brought his former action and issued a subpoena ad testificandum to the defendant, and tendered to him a reasonable sum of money for his expenses; that the action came on for trial; that plaintiff had a good cause of action; that defendant was able to attend, and that his evidence was material for the plaintiff; that defendant made default, and plaintiff was obliged to withdraw the record. The defendant pleaded not guilty; and, secondly, that plaintiff could have proceeded to trial without the testimony of defendant. In this state of the record, the defendant tendered evidence for the purpose of shewing that plaintiff had not a good cause of action in the original suit. Lord Denman, however, rejected this evidence, because the defendant had not traversed the allegations in the declaration that the plaintiff had a good cause of action, and that defendant's evidence was material. Those allegations were therefore admitted by the pleas to be correct, and consequently the defendant had estopped himself from giving the evidence in question. And of this opinion was the Court of Common Pleas, after hearing arguments upon a motion for a new trial.

14. SLANEY *v.* SIDNEY. 3 Dowl. & Lowndes, 250.

Practice — Interpleader Act.

Sidney and Co. had agreed to purchase from the plaintiff certain chests of tea, the warrants for which were made out in the plaintiff's name. Before Sidney and Co. had paid for the tea, they were served with a notice by A. and Co. that the tea warrants belonged to them, and were required not to pay the price to the plaintiff. Two actions were then commenced: the present plain-

tiff sued Sidney and Co. in default for the price of the tea ; and A. and Co. sued Sidney and Co. in trover for the conversion of the warrants. Sidney and Co. being prepared to pay the money into Court, applied to the Court of Exchequer for an order of interpleader. Parke, B. "Here the parties cannot interplead ; for they do not claim the same thing : the one seeks to have the benefit of a contract, and the other the subject matter of it. The plaintiff in this action claims the price agreed to be paid, which may be ten times the value of the goods ; while the plaintiffs in the other action only claim their real value. A person may make an imprudent bargain, and agree to pay 100*l.* for what is not really worth 20*l.*" Alderson, B. "The interpleader act was intended as a substitute for the old mode of obtaining relief by bill in equity. Now it is perfectly clear, that in a case like this, there could have been no interpleader in equity."

15. PERKINS v. ADCOCK. 3 Dowl. & Lowndes, 270.

Practice — Security for Costs.

In this case it was shewn to the Court that the action was brought to recover a debt of 8*l.* 11*s.* 4*d.* ; that the plaintiff was in insolvent circumstances, and had assigned all his property, including the debt in question, to two of his creditors in trust for his creditors generally ; and that the plaintiff was consequently suing solely for the benefit of the assignees. The Court of Exchequer granted a rule calling on the plaintiff to shew cause why he should not give security for costs. Cause having been shewn, the Court made the rule absolute. Pollock, C. B. "When a bankrupt or insolvent sues, not for his own benefit but for that of his assignees, he may be required to give security for costs. In this case the real plaintiffs are the assignees of this portion of the plaintiff's property, in trust for the general body of creditors." Rule absolute.

II. POINTS IN EQUITY.

1, 2, 3. Trustee. Breach of Trust. Measure of Liability for Misinvestment.
 4, 5, 6. Evidence. Discovery. Confidential Communication. 7. Conversion.
 Devisee and Executor. 8. Voluntary Settlement of Wife's Estate. 9.
 Award. Interview with Arbitrator. 10. Legacy. Discharge. Husband
 and Wife. 11. Partnership. Dissolution. 12. Discovery. 13, 14. Practice
 and Pleading.

1. SHEPHERD V. MOULS. 4 Hare, 500.

Trustee — Breach of Trust.

The liabilities of trustees for the loss or misapplication of trust funds are so frequently brought under discussion in Courts of Equity, that it is important to call attention to any discrepancy which may be observed in the decisions to which this subject gives occasion. In *Watts v. Girdlestone*¹ Lord Langdale, M. R., delivered his opinion, that where trustees are directed to invest trust-money in Government or real securities, *and they do neither*, they are answerable, at the *option* of the *cestui que* trust, either for the money which was to be invested, or for so much Bank 3l. per cent. Consols as might have been purchased with the money at the time when the investment ought to have taken place; and in *Ames v. Parkinson*² his lordship adopted the same principle. Lord Gifford, M. R., also, in *Hockley v. Bantock*³, expressed a similar opinion. Sir John Leach, however, in the case of *Marsh v. Hunter*⁴, took a different view of the subject; and held that the *cestui que* trust in such a case were only entitled to choose between the money and interest, or the money and the actual profit which the trustee had acquired from the use of it. *Marsh v. Hunter* was not cited before Lord Gifford. In the case before us all the previous decisions were referred to, and the Vice Chancellor Wigram concurred with Sir John Leach. The trustees having been directed by the will to invest the residue of the testator's personalty in Government or real securities, they made no investment, but permitted one of the trustees to retain the fund in his hands at 4l. per cent. interest. The plaintiffs (the *cestui que* trust) contended that the defendants should be charged with such an application of the trust-funds as would have been most beneficial to the *cestui que* trust. The Vice Chancellor Wigram. "The only question I have to consider is, whether the trustees are to be charged with the amount of the monies which they have received, with interest, or whether the

¹ 6 Beav. 188.² 7 Beav. 379.³ 1 Russ. 141.⁴ 6 Madd. 295.

parties entitled to the fund have a right to charge them with the amount of stock which they might have purchased with the trust-monies, at the time when such monies were in their hands for investment. Where trustees are bound by the terms of their trust to invest the money in the public funds, and, instead of doing so, retain the money in their hands, the *cestui que* trust may elect to charge them, either with the amount of the money, or with the amount of the stock which they might have purchased with the money. If the trustees are not bound to invest the money in the funds, or in any specific security; but, by the terms of the trust, have a discretion to invest it in various ways, and, instead of doing so, they retain it in their hands; and the *cestui que* trust insist on charging the trustees with the value of some particular security that might have been obtained, there is much more difficulty in dealing with the claim. The discretion given to the trustees to select an investment among several securities, makes it impossible to ascertain the amount of the loss (if any) which has arisen to the trust-fund from the omission to invest, except, perhaps, in the possible case (which has not occurred here) of a particular security having been offered to the trustees in conformity with the terms of the trust. Suppose the trustees were directed to invest monies either in the funds, or in the purchase of lands; there would, at a subsequent time, be no better reason for saying that the trustees ought to have made the investment in the funds, than that they ought to have purchased the land. In this case I see no greater reason for saying that the trustees were bound to invest the trust-monies on Government security, unless a real security had presented itself, than for saying that they were bound to invest the monies in real estate, unless a security in stock had been offered at a given price. The breach of trust is in having made no proper investment, not in having omitted to choose the one rather than the other. My own strong impression for the reasons which I have stated, is in favour of the view taken in *Marsh v. Hunter*. I cannot see upon what principle the Court is to charge the trustees with an accidental improvement in value of one of several securities, where they are not bound, in the execution of the trust, to select that particular security rather than another. The case is very different from that of giving the *cestui que* trust the option of electing between the interest and the profit which a trustee may have made. In one case the Court pursues the actual consequences of the breach of trust; in the other, by going beyond the recovery of the trust-monies and interest, the

Court must proceed on grounds purely hypothetical. I must follow the authority of *Marsh v. Hunter*."

2. *HYNES v. REDINGTON*. 1 Jones & Latouche, 589.

Trustee — Measure of Liability for Misinvestment.

This case deserves notice on account of its having called forth the censure of Lord Chancellor Sugden upon the severe measure of justice which Courts of Equity are in the habit of inflicting upon trustees in cases like *Shepherd v. Moulds* and others, to which reference is made in the preceding note of that case. An executor invested a sum of trust money in the purchase of Bank of Ireland stock, which subsequently fell very much in value. The difference between its market value, as calculated at the price of the day when purchased, and its market value at the price of the day (in 1826) when it was transferred to the credit of the cause, was 678*l*. If the money had been invested in Government 3½ per cents. the loss would have been much less. It was contended for the executor that he ought not to be charged with a greater loss than if he had invested the assets in Government 3½ per cent. stock: and further, that the difference between the amount of the loss incurred by investment in Bank stock and the amount of the loss which would have ensued from an investment at that time in Government 5 per cent. and 4 per cent. stock was the true measure of the liability incurred.

Lord Chancellor Sugden. "I regret to say that the general leaning of the Court is to deal with great harshness with executors. Not only does it make them responsible for loss incurred by the commission of a mistake, but frequently it has given a greater benefit to the persons beneficially entitled than they could have obtained in any other way. This is, I think, a very ungracious demand, and one that would be likely to deter executors from accepting so necessary an office: but I do not think it possible for me to relieve this executor from the consequence of his act; he is properly chargeable with the loss occasioned by the investment which he has made. . . . It was said for the executor that it never has been decided that an executor is responsible for the purchase of bank stock, and I am not certain that the naked point has ever been ruled; but it is clearly within the principle of the decisions. On the part of the executor another point was made; and I must again say that Courts have not administered a proper measure of equity towards executors, while they have enforced the strongest equity against them. It was said, that as it was the duty

of the executor to invest the assets in Government $3\frac{1}{2}$ per cent. stock, and as his representative is now charged with the loss of the money invested in the Bank stock, not because the executor misapplied it, but because he made a mistake in point of law, all that he is to be charged with is the loss which has been sustained by reason of the mistake in not investing in the $3\frac{1}{2}$ per cents. If there be no precedent for such an order, I will make one. I shall endeavour to administer what I conceive to be the true equities of the parties. And, as I must enforce a very harsh obligation, I shall fix the executor with the loss, but not with more than was actually sustained by his mistake; and therefore I shall charge him only with as much as was the loss in 1826, occasioned by his having bought Bank instead of Government $3\frac{1}{2}$ per cent. stock. That I know is equity, and I believe that it is not against the rule of the Court. It is, I believe, the first case upon the question; but I do not hesitate to take upon myself the responsibility of the decision."

3. CHALLEN v. SHIPPAM. 4 Hare, 555.

Trustee — Breach of Trust.

The defendant received 300*l.* upon trust to invest that sum in the funds. He, on the same day, deposited the money in the bank of Ridge & Co., of Chichester, an old-established house, with which he had long kept a banking account for himself; and he at the same time instructed them to invest the money for the purposes of the trust. The chief clerk of the bank at the same time reduced the instructions to writing. The instructions were mislaid by the bankers, and they, without investing the money, or making any communication to the defendant on the subject, carried the amount to his private account. The defendant, relying on the attention of the bankers to his directions, made no enquiry about the matter, and did not discover their omission to make the investment until the bankruptcy of the bankers, after the lapse of five months from the time when the money was paid to the defendant and deposited in the bank. The bill was filed to recover the money from the trustee. Against the defendant the chief argument rested upon his having neglected, for five months, to make enquiry whether the money had been invested; and the Vice-Chancellor Wigram held that the trust fund having been paid into the defendant's hands, he could discharge himself only by shewing its due application; and that the period of five months having elapsed after the deposit of the money, without investment, and without enquiry by

the defendant, he was answerable for the loss which had been sustained.

4. STEELE V. STEWART. 13 Sim. 533.

Evidence — Discovery — Confidential Communications.

In Courts of Equity it becomes a frequent question whether or not the communications which have passed between a defendant and his solicitor, or between the solicitor and third parties, are privileged from discovery. In *Hughes v. Biddulph*¹, the Lord Chancellor Lyndhurst refused to order the production by a defendant of documents containing confidential communications between him and his solicitor, or between his town solicitor and country solicitor, made in their relation of solicitors and client, either during the cause, or with reference to it before its commencement. In the present case the disputed papers contained communications between the defendant's solicitor and the captain of a ship, whom the solicitor had employed to go to Calcutta to collect evidence in support of an action at law; and the communications in question passed between the solicitor and the captain while the latter was so employed; or, as the answer expressed it, *while he was at Calcutta, acting by the direction and as the agent of the defendant's solicitor, in procuring evidence in support of the action*. The answer averred also that the papers related to and concerned such evidence. The case was, that the defendant had recovered a verdict against the plaintiff upon a policy of insurance on a ship which was so damaged during her voyage to India that she was condemned and broken up at Calcutta. The plaintiff having obtained a rule for a new trial, filed a bill of discovery in aid of his defence to the action, and alleged that the ship was not sea-worthy when the policy was effected. The defendant contended that the privilege affecting confidential communications was not confined to the solicitor in a suit, but extended to the clerk of the solicitor, and to any person whom the solicitor might think proper to employ or depute as his own agent in the matter.

The Vice Chancellor of England. "If the party who was sent to collect the evidence had been a clerk of the defendant's solicitors, his communications would have been privileged; and, in my opinion, there is no difference, in principle, whether the communications are made by the clerk to a solicitor or by a person whom the solicitor has employed specially as his agent to collect evidence

¹ 4 Russ. 190.

on behalf of the client. I admit that this is an extension of the rule; but it seems to me that the principle on which the Lord Chancellor acted in *Hughes v. Biddulph* applies to the present case: and, accordingly, I think that the letters which were written by the captain of the ship to the defendant and his solicitors, relative to the evidence which the captain had collected in support of the action, are privileged, and ought not to be produced."

5. *MADEN v. VEEVERS.* 7 Beav. 489.

Discovery — Privileged Communications.

In this case the defendant admitted by her answers that she had divers documents in her possession relating to the subject of suit, but excused the production on the ground that they "related wholly and exclusively to the dispute between the defendant and the plaintiff respecting the defendant's title to the estates, hereditaments, and premises in question, and had been respectively *prepared and made since the said dispute arose, and with a view to, and in contemplation and prospect of, the litigation of the said dispute*, and of the defendant's defence against the claim of the said plaintiff. Production was ordered. Lord Langdale, M. R. "If these documents were cases laid before counsel, and statements made by or for her legal advisers, or communications between her and her solicitor, merely in the relation of solicitor and client, she would be entitled to protection; but that is not said, and the answer does not bring her within the rule."

6. *KERR v. GILLESPIE.* 7 Beav. 572.

Discovery — Privileged Communications.

In this case the defendant resisted the production of certain correspondence which had taken place between himself and his agents in Canada since the filing of the bill; and alleged, that the letters were "written confidentially, and in reference to the defendant's defence in the suit." The agents were not solicitors or professional agents. Lord Langdale, M. R., ordered the production of the documents.

7. *Ex parte HAWKINS.* 13 Sim. 569.

Conversion — Devisee and Executor.

The question in this case arose out of the London Bridge Approaches Act, which contained the usual clauses enabling the City

to take such lands and tenements as might be necessary for the purposes of the act; and authorising the payment of the purchase-money into Court in certain cases of disability or disputed title. In September, 1840, Henry Hawkins, being the owner of a house and warehouse in Lad Lane, was served by the Corporation with notice of their intention to take his premises for the purposes of the act; and he was thereby required to give up possession at the end of six months. In February, 1841, the city surveyor and a surveyor named by Hawkins certified the value of the premises to be 1300*l.*; and in March the solicitor of Hawkins sent an abstract of the title to the property, with a letter requesting an early settlement of the business, on account of the precarious health of Hawkins. In April, 1841, before any further progress was made in the proceedings, Hawkins died. In August, 1842, the money was paid into Court; and thereupon a question arose under the will of Hawkins, whether the purchase money, as between his devisees and his executors, was to be deemed real or personal estate. It was contended for the devisee that the notice given by the City to Hawkins did not amount to a binding contract within the statute of frauds, and that the 1300*l.* retained the character of real estate. The Vice Chancellor of England. "In this case the Common Council gave notice to the testator in his lifetime of their intention to take and use his house and warehouse in Lad Lane for the purposes of the act for widening the approaches to London Bridge; and the matter afterwards proceeded so far, that the money was paid into Court. Under those circumstances, I think it impossible not to say that the nature of the property was changed; that is, the owner of the house and warehouse became the owner of the money, which, subsequent to the giving of the notice, was certified by his agent and the agent of the Common Council to be the value of the property. The effect of the act was to give to the Common Council a parliamentary power to contract for the tenements required for the purposes of the act; and under the same provision they had power to enter upon the tenements at law, a much stronger power than could have been given by any private contract between them and the owners of the tenements. Therefore, my opinion is, that Henry Hawkins, at the time of his death, was entitled only to the money to be paid for the house and warehouse in Lad Lane. . . . Declare that the money is part of the personal estate of the testator Henry Hawkins."

8. COTTERELL V. HOMER. 13 Sim. 506.

Statute 27 Elizabeth, c. 4. — Voluntary Settlement of Wife's Estate.

For the better apprehension of the point of this case, it is necessary to call to recollection the substance of the second section of the above act of Elizabeth; which enacts, that every conveyance of lands made for the intent to defraud such persons as shall afterwards purchase, in fee simple, fee tail, for life, lives, or years, the same lands so formerly conveyed, shall be deemed and taken only as against such persons to be void and of none effect. When the Judges were first called upon to expound this act, they appear to have considered all voluntary conveyances, that is, all conveyances not founded on a pecuniary or valuable consideration, as fraudulent, and consequently void as against future purchasers for valuable consideration; and this construction has continued to the present time.

The facts of the case before us were shortly these. Tamar Homer was seised in fee of a house and land, which, by the settlement made in contemplation of her marriage with Barnett Hinton, were conveyed to the defendants as trustees for her separate use during her life, with remainder to such uses as she should appoint, and in default of application, to and among her children living at her decease, share and share alike, and their heirs; and in default of any such children, then to Barnett Hinton for life; and after his decease upon trust to sell the property and divide the proceeds equally among the brothers and sisters of Tamar Homer then living, and the issue of such of them as should be dead. The plaintiff became the transferee of a mortgage for years and farther charge upon the property in question for the sum of 450*l*., and afterwards purchased the fee simple and equity of redemption, which were conveyed to him by lease and release, to which Hinton and his wife were parties, and a fine. Mrs. Hinton died in July, 1837, and her husband a few months afterwards. Mrs. Hinton left several brothers and sisters, on whose behalf the trustees of the settlement brought an ejectment against the plaintiff's tenant. Thereupon the plaintiff filed a bill in equity, charging that all the limitations in the settlement subsequent to the limitation to Hinton for his life were fraudulent, and void as against the plaintiff, the purchaser of the house and land. The defendants argued, that though a settlement of a man's *own estate* upon his collateral relations might confessedly be defeated by a subsequent sale to a purchaser, yet here the estate belonged to the *wife*, who, during her coverture, was incapable of

entering into a contract, and that the statute in nowise empowered a man enjoying a limited interest in property not his own, but his wife's, to defeat, by his own contract, the limitations which she had previously made of her own property. But this attempt to create a distinction or separation between the wife's conveyance and the husband's contract was overruled by the Court.

The Vice Chancellor of England. "There is too much subtlety in the distinction that has been made between the contract and the conveyance. The law enables a married woman to dispose of the inheritance of her estate, either by levying a fine, or by suffering a recovery of it. By adopting either of these two modes of assurance, she has as full dominion over her property as she would have had if she had been a *feme sole*; in fact, she becomes *quasi a feme sole* with respect to it. And when she joins with her husband in levying a fine, in pursuance of a contract entered into by him, she must be taken to have been an actor from the commencement of the transaction, and consequently the contract becomes as much her act as the act of her husband. Besides, when the estate has been once conveyed by deed and fine, you cannot separate the contract from the conveyance, for the former is swallowed up in the latter. As the plaintiff in this case has paid his purchase-money, and taken a conveyance of the estate from the husband and wife by deed and fine, I am of opinion that he is a purchaser within the meaning of the statute of Elizabeth; and consequently his title must prevail against the parties claiming under the voluntary limitations in the settlement."

9. HARVEY v. SKELTON. 7 Beav. 455.

Award — Intervenor with Arbitrator.

In this case one of the parties to a reference had a private interview with the arbitrator on the subject of controversy, in the absence of the other party. The Court set aside the award. Lord Langdale, M. R. "It is so ordinary a principle in the administration of justice, that no party to a cause can be allowed to use any means whatever to influence the mind of the judge, which means are not known to and capable of being met and resisted by the other party, that it is impossible, for a moment, not to see that this was an extremely indiscreet mode of proceeding, to say the least of it. It is contrary to every principle to allow of such a thing, and I wholly deny the difference which is alleged to exist between mercantile arbitrations and legal arbitrations. The first principles of justice must be equally applied in every case. Except

in the few cases where exceptions are unavoidable, both sides must be heard, and each in the presence of the other. In every case in which matters are litigated, you must attend to the representations made on both sides; and you must not, in the administration of justice, in whatever form, whether in the regularly constituted Courts, or in arbitrations, whether before lawyers or before merchants, permit one side to use means of influencing the conduct and the decisions of the judge which means are not known to the other side. This is not a matter of mere private consideration between two adverse parties, but a matter concerning the due administration of justice, in which all persons, who may ever chance to be litigant, in courts of justice or before arbitrators, have the strongest interest in maintaining, that the principles of justice shall be carefully adhered to in every case. I am of opinion that this award cannot stand."

10. **HARRISON v. ANDREWS.** 13 Sim. 595.

Legacy — Discharge — Husband and Wife.

This case furnishes an illustration of the well-known doctrine that the marital right of a husband to the *choses in action* of his wife is a qualified and not an absolute right; and that reduction into possession is a condition upon which alone the law gives them to him. Hence, if he die without having reduced such property into possession, or released the right to it, the wife becomes entitled to it by survivorship. A legacy having been bequeathed to the wife of one Waters, he agreed with the executors to set off the amount against a promissory note upon which he was indebted to the testator's estate; and Waters and his wife thereupon signed a receipt for the legacy; but it did not appear that the executors gave up the promissory note. Mrs. Waters having survived her husband, it was held, under these circumstances, by the Vice-Chancellor of England, that the legacy had not been discharged, and consequently that Mrs. Waters was entitled to require payment. His Honour laid it down, that nothing but a *release* from Waters, or a payment of the money to him, could operate as a discharge of the legacy against his wife surviving.

11. **BAILEY v. FORD.** 13 Sim. 495.

Practice — Partnership — Dissolution.

It is a well established general rule in Chancery proceedings, that the Court will not make an order on motion, which would

supersede the hearing of the cause. Many attempts are from time to time made to anticipate a decree by seeking the judgment of the Court upon a motion involving the same question which the Court would have to decide at the hearing of the cause. But the Court sets its face against such proceedings as irregular, and in such cases usually reserves its judgment upon the main question in the cause, until it is brought to adjudication upon the pleadings and evidence. There are, however, some cases in which the Court occasionally departs from the rule under consideration, and the present case furnishes an example of this sort. The suit was instituted for the purpose of terminating a partnership subsisting between the plaintiff and defendant as chemists and druggists. The partnership commenced in 1839, and was stipulated to continue for twenty-one years. It was shown that the concern was insolvent, and that its embarrassments were daily increasing. Upon this evidence a motion was made by the plaintiff that a receiver might be appointed to sell the business, collect the debts, and discharge the liabilities. The objection was taken, that such an order could not be made on motion in a suit of this nature. The Vice-Chancellor of England. "Although the general rule is, that the Court will not grant, on motion, that relief which ought to be granted at the hearing, yet it will do so in some cases. It appears that the affairs of this partnership are daily growing worse, and there is no reason to infer, from what is stated in the defendant's answer, that they will ever improve. Under these circumstances, I shall make an order in the terms of the notice of motion."

12. RICE v. GORDON. 13 Sim. 580.

Discovery — Criminating Matter.

Though it is the common rule of equity that a defendant shall not be compelled to make any discovery tending to subject him to penal consequences, yet in this case, where an indictment was pending for perjury committed in the cause itself, and the plaintiff moved for the production of documents which tended, as the defendant alleged, to support the indictment, the Vice-Chancellor held that the rule did not apply. His Honour said, that if he were to refuse the motion for the discovery, he should be holding out an inducement to a defendant to commit perjury in an early stage of the cause, in order to prevent the Court from administering justice in the suit.

13. *PARIENTE v. BENSUSAN.* 13 Sim. 522.*Practice — Injunction.*

After the common injunction had been extended to stay a trial at law, the plaintiff in the action obtained a Judge's order to change the venue in the action. The Vice-Chancellor of England held this step to be a breach of the injunction.

14. *POWELL v. WRIGHT.* 7 Beav. 444.*Parties to Suits — Solicitors.*

In suits in Chancery it frequently happens that parties having different and even conflicting rights, are represented by the same solicitor: and want of confidence is thus occasionally created on the part of suitors towards professional men, whose position is not thoroughly understood by the public. The subject in question is one of great practical difficulty, and therefore the following remarks, which fell from the Master of the Rolls in the present case, will probably not be unacceptable to our readers. Lord Langdale, M. R. "I lay out of sight the observation that the individual who represents the trustees is the solicitor of the plaintiff. There have been instances in which parties having adverse interests have been represented by one solicitor, and yet the case has been very properly conducted, in such a way as to bring before the Court every thing necessary for maintaining the interest of each. In many cases, however, a very considerable and serious injury has resulted from that mode of conducting a case. Sir John Leach laid down the rule, that in no case whatever should a solicitor act for plaintiff and defendant, and if he found that was done, he took strong measures to put a stop to it: but the rule could not be enforced, for the solicitor had the power of resorting to the expedient of acting by another solicitor nominated by himself. Experience of this has made me come to the conclusion, that where the same person acts for persons supposed to have adverse interests, it is better that the truth should be known, than that there should be a pretence of different solicitors acting, when, in point of fact, there is but one. In the one case you have vigilance and attention paid to the subject, which would not be if there was a mutual accommodation of names."

III. POINTS IN THE LAW OF PROPERTY.

1. Devise of Property. Trust Estate. 2. Waste. Willow Trees. 3. Lease by Agent to Sub-agent. 4. Copyhold. Demise contrary to Custom. 5. Right to Title Deeds. 6. Lease. Joint Covenanters.

1. TITLEY v. WOLSTENHOLME, 7 Beav. 425.

Trust Estate — Devise.

It will probably be recollected that in the case of *Cook v. Crawford* (13 Sim. 91.) the Vice Chancellor of England delivered a judgment in which the common practice of making a devise of the fee simple of trust estates vested in the testator as sole or surviving trustee, was strongly censured; that passage of his Honour's judgment which relates to the point in question was in these terms: "I must enter my protest against the proposition which was stated in the course of the argument, that it is a beneficial thing for a trustee to devise an estate which is vested in him in that character. My opinion is, that it is not beneficial to the testator's estate, that he should be allowed to dispose of it to whom he may think proper, *nor is it lawful for him to make any disposition of it; he ought to permit it to descend*, for in so doing, he acts in accordance with the devise made to him: if he devises the estate, I am inclined to think that the Court, if it were urged so to do, would order the costs of getting the legal estate out of the devisee to be borne by the assets of the trustee. I see no substantial distinction between a conveyance by act *inter vivos* and a devise; for the latter is nothing but a *post mortem* conveyance; and if the one is unlawful, the other must be unlawful." The importance of this opinion, with reference to his Honour's high reputation in the learning of real property, cannot be over estimated. It becomes necessary, therefore, to bring to the notice of our readers the opinion on the same subject of another distinguished judge, possessing co-ordinate jurisdiction in the same Court. Lord Langdale, M. R. "When a trust estate is limited to several trustees and the survivors and survivor of them, and the heirs of the survivor of them, and no power of appointing new trustees is given, we observe a personal confidence given, or at least probably given, to every one of the several trustees. As any one may be the survivor, the whole power will eventually come to that one and he is entrusted with it, and being so, he is not, without a special power, to assign it to any other; he cannot, of his own authority, during his own life, relieve himself from the duties and

responsibilities which he has undertaken. But we cannot assume, that the author of the trust placed any personal confidence in the *heir* of the survivor; it cannot be known beforehand, which one of the several trustees may be the survivor; and as to the contingent survivor, it cannot be known, beforehand, whether he may have an heir or not, or whether the heir may be one, or may consist of many persons, trustworthy or not, married women, infants, or bankrupts, within or without the jurisdiction. The reasons, therefore, which forbid the surviving trustee from making an assignment *inter vivos*, in such a case, do not seem to apply to an assignment by devise or bequest; which, being made to take effect only after the death of the last surviving trustee, and consequently after the expiration of all personal confidence, may, perhaps not improperly, be considered as made without any violation or breach of trust. It is to take effect only at a time when there must be a substitution or change of trustees; there must be a devolution or transmission of the estate, to some one or more persons not immediately or directly trusted by the author of the trust:—the estate subject to the trusts must pass either to the *hæres natus* or the *hæres factus* of the surviving trustee, and if the heir or heirs at law, whatever may be their situation, condition, or number, must be the substituted trustee or trustees, the greatest inconvenience may arise, and there are no means of obviating them other than by application to this Court. With great respect for those who think otherwise, and quite aware that some inconveniences, which can only be obviated in this Court, may arise, from devising trust estates to improper persons for improper purposes; I cannot at present see my way to the conclusion, that in the case contemplated, the surviving trustee commits a breach of trust by not permitting the trust estate to descend, or by devising it to proper persons, on the trusts to which it was subject in the hands of the surviving trustee.” The embarrassment and uncertainty occasioned by conflict of opinion between two such eminent judges cannot, we fear, be overcome, until the point has been submitted to the judgment of a higher tribunal. It is impossible, however, to avoid observing that the opinion of Lord Langdale is in most accordance with the established practice of conveyancers. At the same time it is obvious, that a trustee who suffers the trust estates vested in him to descend by course of law, is on the safe side of the question, and does not expose his devisee to the risks and expenses to which the Vice Chancellor of England alluded in *Cooke v. Crawford*.

2. PHILLIPS V. SMITH. 14 Mees. & W. 499.

Waste — Willow Trees.

It is laid down by Lord Coke, that cutting down willows, birch, beech, asp, maple, or the like, standing in the defence and safeguard of a house, is waste (Co. Litt. 53 *a.*). It appears also that, by the custom of some parts of the country, certain trees, not usually considered as timber, are deemed to be such by reason of their being used for building, as birch-trees in Yorkshire. (Cru. Dig. tit. 3. c. 2.) So also the destruction of germens, or young plants destined to become trees, is waste ; because it destroys the future timber (Co. Litt. 53 *a.*), and so becomes prejudicial to the inheritance of the land. And this prejudice to the inheritance appears by the case under consideration to be a primary test of waste. The defendant was tenant from year to year of a farm in Leicestershire ; and the action was brought against him for management and cultivation contrary to the local course of husbandry, and for untenant-like conduct. At the trial, the only acts proved against the defendant were, that he had cut down, for the purpose of sale, a number of pollard willow trees, of considerable size, which grew on the side of a brook, but were not shewn to be of any service in supporting the bank, or in protecting the farmhouse. Some trivial injury to the fence was also proved. The willows were not uprooted, but were cut down close to the ground, so as to form stools or butts, from which fresh shoots grow again : and the question was, whether this treatment of the willows amounted to waste. Mr. Justice Maule reserved the point : and the jury, having found for the plaintiff, and assessed the value of the willows at 64*l.*, the learned judge gave the defendant leave to move to reduce the damages by that amount. The question was accordingly argued before the Court of Exchequer ; and the point was decided in favour of the defendant. Alderson B. "Those acts are not waste which, as Richardson C. J., in *Barrett v. Barrett*¹, says, are not prejudicial to the inheritance ; as, in that case, the cutting of willows, maples, beeches, and thorns, there alleged to be of the age of thirty-three years, but which were not timber, either by general law or particular local custom. So likewise, cutting even of oaks or ashes, where they are of seasonable wood, *i. e.* where they are cut usually as underwood, and in due course are to grow up again from the stumps, is not waste. Now if we apply

¹ *Hetley*, 35.

the principles to be extracted from the authorities to the present case, we have no difficulty in saying, that the cutting of these willows does not amount to waste. They are not timber-trees; and when cut down they are not, so far as appears by the evidence, destroyed, but grow up again from their stumps, and produce again their *ordinary and usual profit* by such growth; therefore neither is the thing demised destroyed, nor is the thing demised changed as to the inheritance; for profit remains, as before, derivable from the reproduction of the wood from the stump of the willow cut down. Nor are the trees in such a situation as to make the cutting of them waste, by reason of what is called collateral respect; as where trees not timber are situated so as to be useful for protection of a house (Co. Litt. 53.), and so become, as it were, a part of the house; as, in Hob. 219. willows growing within the site of the house. Nor are they willows within view of the manor-house, which defend it from the wind; or in a bank, to sustain the bank (12 H. 8. 1.); or like whitethorn, used for the like purpose; or where they stand in a field depastured, and are used for the shade of the beasts depasturing, and so are intended permanently to remain in that particular form, for the advantage of those to whom the inheritance may thereafter come. We therefore think that the cutting of them by the defendant was not an act of waste at the common law; and as he is not liable, either by agreement or by the custom of the country, for having cut them, we think the verdict should be reduced, and the rule made absolute for that purpose."

3. ROSSITER v. WALSH. 4 Dru. & Warr. 485.

Principal and Agent — Excess of Authority — Beneficial Lease by Agent to Sub-Agent,

In this case four sisters were entitled as co-heiresses to the lands comprised in a lease which was impeached as invalid under the following circumstances. Three of the co-heiresses resided abroad; the fourth, Mrs. Byrne, was a widow, and resided in Ireland. In 1830, Mr. A., who was a relation of the family, was appointed agent of the estate, and a power of attorney was prepared, enabling him to grant such leases as might be required for the judicious management of the property. This power was signed by three of the sisters, but not by Mrs. Byrne, who was, nevertheless, in constant communication with Mr. A. respecting the property, and fully recognized him as the agent. The agent residing at Waterford, at a considerable distance from the lands in question, required the

assistance of a sub-agent, who was not a mere bailiff or driver, but acted under Mr. A.'s orders, and occasionally communicated with Mrs. Byrne in person. Upon the lands becoming vacant by the insolvency and disappearance of the former tenant, Mr. A. granted a lease to Walsh, his sub-agent; and in so doing, he did not assume a power over three-fourths only; he demised the entirety; and the lease purported to be made by virtue of a letter of attorney from the four sisters. But he had no such power from Mrs. Byrne, as will be remembered. Under these circumstances the four sisters filed a bill to set aside the lease. Lord Chancellor Sugden, "As to Mrs. Byrne, the relief sought is quite of course. How then is the lease to stand as against the other parties? Is it to be reformed, and three-fourths retained, or to be cancelled altogether, and the three-fourths to be re-demised to the defendant? Looking at the substance of the contract and the meaning of the parties, A. (the agent) meant to lease the entire of the property to Walsh (the sub-agent), to obtain a demise of the whole; but A. had no power to do what he assumed to do; yet he meant to do this or nothing, and the tenant in like manner only intended to take all. It would be injurious to the lessors to allow the lease to operate over three undivided shares. The lease cannot operate as intended by the parties; and therefore, having regard to the circumstances, cannot have any operation at all. When I look at the situation of the parties, and the time when this lease was executed; when I find that A. (the agent) was at that period in pecuniary embarrassments; that within a very short time afterwards — in the following month, I believe — he left his residence in Waterford and absconded; I must say, that his conduct prevents me from placing any confidence in his acts. When he executed the lease, he must have forgotten his power: and he, the principal agent, granted it to his under-agent, just at the moment when he (Mr. A.) was about to quit the country. Under these circumstances, I think that this is a case in which a Court of Equity is bound to interfere."

4. DOE DEM. ROBINSON V. BOUSFIELD. 6 Q. B. 492.

Copyhold — Demise contrary to Custom — Forfeiture.

The defendant in this case was tenant from year to year of copyhold lands, and was holding over after notice to quit. The lessor of the plaintiff claimed under a lease for twelve years, granted by the copyholder; but, by the custom of the manor, the tenants could not lease for more than three years. A verdict had been given for

the plaintiff, and defendant afterwards moved for a rule for a non-suit, which was refused by the Court of Queen's Bench. The cases of *Haddon v. Arrowsmith* (Cro. Eliz. 461.); the *Lady Montague's* case (Cro. Jac. 301.); and *Eastcourt v. Weeks* (1 Salk. 186.), having been cited, the Court of Queen's Bench gave judgment. Lord Denman C. J. "These cases are important, as establishing that a lease beyond the custom is not void, but only a ground of forfeiture, which may be waived by the lord, and which the reversioner even cannot avail himself of, much less a mere stranger. There is no ground, therefore, for the present application; and we do not wish to encourage a doubt upon the matter by granting the rule."

5. DAVIES v. VERNON. 6 Q. B. 443.

Right to Title Deeds — Principal and Agent — Jus tertii — Trover — Conversion.

Certain lands were limited by marriage settlement to D., the husband, for life, with a joint power of appointment in the husband and wife. The lands were afterwards mortgaged for a term of years to one Allen, and the title deeds, which were mentioned in the mortgage deed, were handed over to him. There were various assignments of this mortgage term, but the title deeds were not mentioned in any of them; and they were eventually handed back by Allen to the husband, D. The lands were afterwards mortgaged in fee to Thomas Jobson, but the title deeds were not mentioned in this mortgage, they having previously been deposited by D. with the defendants, who were solicitors for one E. Vernon, as a collateral security for money charged on other lands belonging to D., and not included in the settlement. After the mortgage in fee the power contained in the settlement was executed by the husband and wife giving a power of appointment to the survivor. The wife survived, and appointed to herself in fee, and applied to defendants for the title deeds in question; offering at the same time to pay E. Vernon's claim against D., but protesting against her liability to do so. Defendants, however, refused to deliver up the deeds until their costs and a cash account stated in D.'s lifetime between him and one of the defendants individually were also paid. Plaintiff then brought this action of trover, to recover possession of the title deeds from the defendants, who held them as solicitors for E. Vernon. It was held that the mortgage to Allen was a good execution of the power contained in the marriage settlement, and that Allen was entitled to the deeds as against both the husband and wife, but that he would have been bound to give them

up to the assignees of the term if they had been required, although they were not mentioned in the assignments. That the husband and wife, the mortgagors, being joint appointors of the term, the delivery of the deeds to the husband accrued to the benefit both of himself and his wife; and that he, as tenant for life of the estate, was entitled to hold them for his life; and that on his death, they would belong to the person to whom he and his wife should have appointed the fee under the power, namely, to the wife. That the deeds not being mentioned in the mortgage in fee, and not having been handed over to the mortgagee, the mortgagors might lawfully retain them in respect of their equity of redemption as against the mortgagee, and at any rate a stranger could not set up the right of the mortgagee, who had never asserted it himself, and whose mortgage contained no mention of the deeds. That the husband, who deposited the deeds with defendants, being tenant for life only, their right to hold them ceased at his death, and that they were then bound to deliver them up to the wife, who then became entitled. It was also held that the defendants were the proper parties to the action, they having originally received the deeds, and being in possession of them at the time of the demand. That in trover a privity between the parties is quite unnecessary, and that an agent is liable in trover for a conversion to which he is a party, though it be for the benefit of his principal. The Court also held that there was sufficient evidence of a conversion, the defendants, being in possession of the deeds, having attempted to annex a condition to the delivery of them which they had no right to annex, and not refusing to deliver them up on the ground that they must act under the orders of their principal.

6. BRADBURNE v. BOTFIELD. 14 Mees. & W. 559.

Lease — Joint Covenantees.

Sir E. Winington and J. A. Addenbrooke were seised in fee of one undivided fourth part of certain mines, in trust for Emma Foley; Mary Whitley was seised in fee of another undivided fourth part; and William Townsend was seised in fee of the other two undivided fourth parts, in which George Townsend and Sarah Townsend also had equitable interests. All these parties, together with Edward, the husband of Emma Foley, joined in demising the entirety of the lands to the defendant and Thomas Botfield and Beriah Botfield, for sixty years; the rent being reserved unto *all the lessors respectively, and to their respective heirs and assigns, according to their several and respective estates.* The lessees

jointly and severally covenanted with all the lessors (by name), *and each and every of them, their and each and every of their heirs, executors, administrators, and assigns*, to keep buildings in good repair, &c. Addenbrooke survived all his co-lessors; and the plaintiff, as the assignee of Addenbrooke's share, now sued in covenant for non-repair. The question arose upon demurrer to a plea of Addenbrooke's survivorship, whether the covenant, *quoad* the covenantees, was joint and several, or purely joint, so that in the latter alternative it could only be put in suit by all the covenantees or the survivors or survivor, or the representative of the last survivor. The Court was of opinion that the covenant was such as *all* the covenantees, if living, must have jointly sued upon; and therefore that the representative of Addenbrooke, and not the present plaintiff, was the proper party to sue in the present case. Judgment for defendant.

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* Our attention has been called to the abstract in Vol. III. p. 457. of the case of *Hammeraley v. De Biel*, reported in 12 Clark and Finnelly, p 45. We have received a note from Mr. Finnelly on the subject, and we agree with that gentleman that our censures were not called for.

POSTSCRIPT.

SINCE our last Number a most important event has happened; the Ministry have been changed, and after great improvements in the commercial laws and policy of the state. Their successors are men who have never committed themselves to any opinions hostile to the amendment of the Law. On the contrary, many of them belonged to governments which made many important improvements in our jurisprudence, more especially in 1833 and 1834, and carried through other amendments in the system, begun by their predecessors in 1828. It would be most unjust, therefore, to express any apprehension that this great cause will meet with adversaries in the new Ministers. Nevertheless, we cannot suffer the event of Lord Lyndhurst's retirement from the Great Seal to pass without tendering him, respectfully, our heartfelt thanks for the constant and undeviating support which he afforded to the important measures recently proposed for the reform of the law. The noble and learned Lord's own Bills have been of great value. But his countenance to the recent movement for the amendment of the Law has been still more beneficial. We trust the conduct, in this respect, of those who have succeeded to power will not be such as to make the friends of Law Reform lament the change. Nay, we express our confident hope and belief to the contrary. With the political part of the matter we can have no concern whatever. We are the colleagues of whatever party will aid us; or, not aiding, will permit us to hope for the general amendment of the Law. We look, indeed, to the present Ministry for many specific reforms,—as Chancery reform, more especially as connected with the Masters' Office; the entire remodelling and re-construction of the Ecclesiastical Courts; the facilitating the Transfer of Property; the improvement and simplification of our titles to land; and the establishment of an efficient system of local and departmental justice. We think we have reason to expect that these measures will be introduced, not hastily, but after mature preparation, and all due investigation. We are satisfied that no measures will be more justly popular with the public and with all parties in the state, than those which we have indicated. The establishment of small debt courts, and the reform of the Court of Chancery, perhaps, press more than any others for early attention. As to the first measure, we think that it will be found possible in the present session to pass the Bill now before the House of Lords, with some alterations. Local courts are petitioned for as a necessity by the tradesman and farmer in almost every town and village in the country; and if, instead of being given as they now are, by private acts, they can be established on a uniform system, a great benefit will be conferred on the administration of justice.

Chancery Reform is pressing itself upon public attention in a way not to be mistaken; and it becomes important to understand what it is in the Court of Chancery that needs reform. Are the principles administered there the cause of the reproaches which are heaped on it—reproaches so long continued, so often repeated? So far from this being the case, the principles of our Courts of Equity are universally admired. As a whole, they are the perfection of common

sense as applied to the subjects of equitable jurisdiction ; they have kept pace with the wants of the time ; they have adapted themselves to the varying necessities and wishes of the age. They have been gradually collected as the occasion required, and form a splendid monument of human sagacity and intelligence. Is it, then, the Judges of the Court of Chancery who are less highly thought of than their brethren of the common law Bench ? Far from it. The roll of Chancery Judges is at least as illustrious as that of any other Court in the country. If it be not, then, the principles administered in the Court of Chancery, nor the Judges who administer them, what is it that renders the Court a subject of execration and disgust ? We answer in one word, — it is its *PROCEDURE*. It is the mode by which the relief administered in that Court is obtained, and more especially it is that part of it which relates to the Masters' Office that demands reform. We trust, then, that some effort will be made in this direction, and that the fees paid by the suitor to the various officers of the Court will be carefully looked into.

Mr. Watson's motion for a committee as to the late Chancery compensations, elicited some important declarations from the late ministers, Sir Robert Peel and Sir James Graham expressing a willingness to grant an inquiry before a committee into all fees paid in courts of law and equity ; and Sir George Grey, as Home Secretary, has expressed the same sentiment ; so that, in the next session, we may expect a very useful inquiry on this subject.

We are sorry to find that two valuable bills, the one abolishing deodands, the other giving compensation to the representatives of persons who have been accidentally killed, which have been introduced by Lord Campbell, and have passed the House of Lords, are now in some peril in the House of Commons. We trust, however, that they may still become the law of the land in the present session.

A bill is to be introduced for throwing open the Court of Common Pleas, and so far abolishing the monopoly of the serjeants. It will probably be unopposed, and may pass into law.

July 27. 1846.

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END OF THE FOURTH VOLUME.

ERRATUM. Page 335. line 8. for "posuere" read "poscere."

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